MISSISSIPPI LAW JOURNAL

ARTICLE

AN HISTORICAL PERSPECTIVE OF THE MISSISSIPPI LAW REGARDING FIXTURES PRIOR TO INTRODUCTION OF THE UNIFORM COMMERCIAL CODE

Daniel Fenton Adams

COMMENTS

EXEMPTIONS FROM REGISTRATION UNDER THE SECURITIES ACT OF 1933 AND REGISTRATION OF SECURITIES UNDER THE MISSISSIPPI SECURITIES LAW

CONSTITUTIONAL LIMITATIONS UPON THE USE OF STATUTORY CRIMINAL PRESUMPTIONS AND THE FELONY-MURDER RULE

STUDENT RIGHTS AND DUE PROCESS: PROCEDURAL REQUIREMENTS OF GOSS V. LOPEZ

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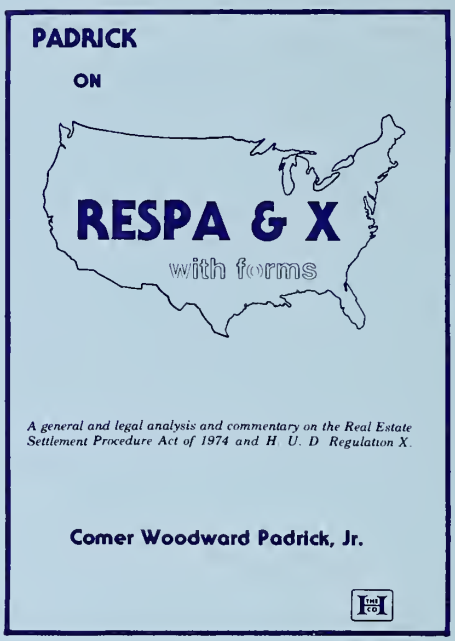
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AN HISTORICAL PERSPECTIVE OF THE MISSISSIPPI LAW REGARDING FIXTURES PRIOR TO INTRODUCTION OF THE UNIFORM COMMERCIAL CODE

*Daniel Fenton Adams**

Reported Mississippi cases considering the law of fixtures are not numerous, and many questions that have arisen in other jurisdictions have not been passed upon in Mississippi. The cases that have been reported will be classified and discussed by comparison with the national pattern of fixtures case law reported in the treatise, *American Law of Property*.[1]

Traditionally, in England and the United States, controversies involving chattels which have been brought into close association with land can be resolved by determining whether or not the chattels have become "fixtures."[2] Further, it has been assumed that the determination can be made by applying a single test.[3]

In England the test has been whether the chattels have been annexed to the realty in such a way as to appear to be a permanent addition; if so, the chattels are treated as having become real property, belonging to the owner of the land.[4] The English "annexation" test was derived from the Roman maxim *quicquid plantatur solo, solo cedit*—whatever is affixed to the soil belongs to the soil—and was considered to state a rule of law, emphasizing the degree and kind of physical attachment of the chattels to the land or its structures.[5] The English cases have, however, found it necessary to make "exceptions" to the general "rule."[6]

---

* Professor of Law, University of Mississippi; A.B., 1947 Dickinson College; LL.B., 1949; J.D., 1968, Dickinson School of Law.

[1] Niles & Merryman, *Fixtures and Things Growing on the Land* in 5 AMERICAN LAW OF PROPERTY §§ 19.1-.14 (A. Casner ed. 1952) [hereinafter cited as AM. LAW PROP.].

[2] *Id.* § 19.1, at 3-4.

[3] *See id.*

[4] *In re* Hulse, [1905] 1 Ch. 406, 411; Hobson v. Gorringe, [1897] 1 Ch. 182, 192 (1896); Lancaster v. Eve, 141 Eng. Rep. 288, 290 (C.P. 1859); Mackintosh v. Trotter, 150 Eng. Rep. 1108, 1109 (Ex. 1838); Elwes v. Maw, 102 Eng. Rep. 510, 516 (K.B. 1802). *See generally* Niles, *The Rationale of the Law of Fixtures: English Cases*, 11 N.Y.U.L.Q. REV. 560 (1934).

[5] Reynolds v. Ashby & Son, [1904] A.C. 466, 475; Hobson v. Gorringe, [1897] 1 Ch. 182, 191-92 (1896); Holland v. Hodgson, L.R. 7 C.P. 328, 333 (1872). *See also* 5 AM. LAW. PROP., *supra* note 1, § 19.2, at 4-5 nn.1-6.

[6] *In re* Hulse, [1905] 1 Ch. 406, 411; Gibson v. Hammersmith & City Ry., 62 Eng.

In the United States, the English test was accepted in the earlier cases,[7] but beginning in the mid-19th century, American jurisdictions shifted to a test emphasizing intention: If the things are placed on the land with the intention to make them permanent additions, they become real property and belong to the owner of the realty.[8]

The American "intention" test supposedly made unnecessary the subtle and confusing exceptions to the general English rule, but it has suffered from ambiguity as to just whose intention should be controlling and how that person's intention should be ascertained.[9] As a result, the American cases have developed into a confusing pattern. Moreover, application of the "intention" test has often been distorted by a tendency to permit the English "annexation" test to continue to influence American decisions.[10]

The most serious weakness of both tests is their inadequacy to provide a sound guide for resolution of all disputes involving chattels affixed to land. There are many diverse problems involving fixtures, often involving differing questions of policy which cannot be resolved satisfactorily by resort to any single formula defining "fixtures."[11]

In an effort to eliminate the confusion, *American Law of Property* makes a basic distinction between cases in which a chattel is affixed by an owner to his own land ("common ownership" cases) and those where a chattel is affixed or allowed to be affixed by its owner to the land of another ("divided ownership" cases). The distinction is grounded in the belief that the two classes of cases present importantly different questions.[12] In common ownership cases, the main question is usually

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Rep. 748, 750 (V. Ch. 1862); Lawton v. Lawton, 26 Eng. Rep. 811, 812 (Ch. 1743); Poole's Case, 91 Eng. Rep. 320 (K.B. 1703). *See generally Niles, supra* note 4.

[7] Tifft v. Horton, 53 N.Y. 377, 385 (1873) (suggesting that Massachusetts follows the English rule); Murdock v. Gifford, 18 App. Div. 28, 33 (N.Y. 1858); McDavid v. Wood, 52 Tenn. (5 Heiskell) 95, 96 (1871). *See also* Niles, *supra* note 4.

[8] Teaff v. Hewitt, 1 Ohio St. 511, 530 (1853); *see* First Nat'l Bank v. Clifton Armory, 14 Ariz. 360, 128 P. 810, 812 (1912); Kanawha Nat'l Bank v. Blue Ridge Coal Corp., 107 W. Va. 397, 148 S.E. 383, 385 (1929). *See generally* 5 AM. LAW PROP., *supra* note 1, § 19.3.

[9] *See* 5 AM. LAW PROP., *supra* note 1, § 19.3, at 17.

[10] *E.g.*, Manufacturers Bank & Trust Co. v. Lauchli, 118 F.2d 607, 611 (8th Cir. 1941); *see, e.g.*, Silverman v. Mazer Lumber & Supply Co., 252 Ala. 657, 42 So. 2d 452, 454 (1949).

A minority of states have adopted an "institutional" test, which is derived from Lord Mansfield's opinion in Lawton v. Salmon, 126 Eng. Rep. 151 (C.P. 1782). *See, e.g., In re* Ginsburg, 255 F.2d 358, 361 (3d Cir. 1958); Fahmie v. Nyman, 175 A.2d 438, 441 (N.J. Super. App. Div. 1961); First Nat'l Bank v. Reichneder, 371 Pa. 463, 91 A.2d 277, 278 (1952); Messenger Publishing Co. v. Board of Property Assessment, 183 Pa. Super. 407, 132 A.2d 768, 769 (Pa. Super. 1957). Since Mississippi cases do not appear to have been influenced by the "institutional" test, it is not discussed in this paper.

[11] 5 AM. LAW PROP., *supra* note 1, § 19.1, at 4.

[12] *Id.* § 19.1, at 4; § 19.4, at 24; § 19.5, at 25; § 19.8, at 32.

whether the thing affixed to the land (which will hereafter be referred to as "goods", whether or not it is deemed to have become a "fixture") is to be treated as having taken on the characteristics of real property.[13] In the divided ownership cases, an additional question likely to arise is whether the ownership of the goods passed to the owner of the land by accession.[14] If there has been no transfer of title, a further question arises: Despite the continued ownership of the goods by the person who owned them before the time of their affixation, are the goods to be treated, for at least some purposes, as real property?[15] Within these two broad classes, further classification is made on the basis of the relation of the parties to the dispute in which the fixtures problem arises.[16]

As will be seen, Mississippi's case law on fixtures has gone through an evolution similar to other jurisdictions and reflects many of the same inconsistencies and confusions characteristic of American law generally. The focus of attention in this study is on the law of "fixtures" prior to the advent of the Uniform Commercial Code. In states which have enacted the Code,[17] some of the pre-adoption case law may now be obsolete. The extent to which this is true in Mississippi calls for another study, for which this article will hopefully provide a useful background.[18]

I. Common Ownership Cases

A. Heir v. Executor

The common law doctrine that real property of a decedent descended to the heir, while personal property passed to the personal representative, required a determination whether chattels affixed to the decedent's land were real or personal property at the time of death.[19] This question has generally been resolved by determining whether the goods in question had become fixtures. If so, they passed to the heir; otherwise, they went to the personal representative.[20] Although there has been some disagreement in the American cases,[21] the general rule in the United States has been that the decedent's annexations to his land were

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[13] *Id.* § 19.7, at 28.

[14] *Id.* § 19.8, at 32.

[15] *Id.* § 19.1, at 4.

[16] *See id.* §§ 19.5-.12. *See generally* Niles, *supra* note 4.

[17] Every state except Louisiana has enacted the Uniform Commercial Code. E. Farnsworth & J. Honnold, Cases and Materials on Commercial Law 7 (2d ed. 1968).

[18] A subsequent issue of the *Mississippi Law Journal* will contain an article on the effect of the adoption of the Uniform Commercial Code on the Mississippi law of fixtures.

[19] 5 Am. Law Prop., *supra* note 1, § 19.5.

[20] *Id.*

[21] *See id.*

intended to become a part of it and hence should pass to his heir.[22] However, the issue has become less important because many jurisdictions now statutorily de-emphasize the distinction between real or personal property for inheritance purposes.[23]

No Mississippi case presenting this particular problem has been found. In *Winn v. Eatherly*,[24] however, a similar question arose regarding what property passed by devise in a will. At the time of her death the testatrix owned a large plantation. She devised part of it to the plaintiff, while another portion went to Annie Bridges under the residuary clause. On the portion devised to the plaintiff there was, and had been for some years, a large bell attached to a wooden stand by removable metal bolts. The defendant, an employee of Annie Bridges, removed the bell, and the plaintiff brought a replevin action to recover it. In affirming the judgment for the plaintiff, the court reasoned: (1) unless the defendant was entitled to a directed verdict as to all the property replevied, the court below did not err in refusing it; (2) if any of the property replevied had been so affixed to the land devised to plaintiff as to become part of it, then it became plaintiff's property under the will—only such property as was not so affixed went to Annie Bridges under the residuary clause; and (3) the plantation bell, at least, "was undoubtedly a fixture."[25]

Love v. Union Central Life Insurance Co.,[26] considered as the sole precedent in *Winn*, did not involve a contest between devisee and legatee but between two holders of trust deeds. The result in *Love* turned upon whether gin stands, installed in a cotton gin by the landowner prior to his execution of the two deeds of trust, became subject to the earlier deed of trust which described the land mortgaged but made no mention of the cotton gin or its component parts. "If the gin stands are classed as fixtures," said the court, "they are covered by the [earlier] deed of trust."[27] The court concluded that the gin stands were fixtures and affirmed the decree in favor of the holder of the earlier deed of trust.[28]

In its discussion of the key issue, the court enunciated the essence of the "intention test":

> Whether an article or structure is a fixture, and therefore part of the realty to which it is annexed, is a question of fact determined primarily

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[22] *Id.*; *see, e.g.*, Tuttle v. Robinson, 33 N.H. 104, 119 (1856); Bannerot v. Bannerot, 238 Pa. 606, 86 A. 489, 491 (1913).

[23] 5 AM. LAW PROP., *supra* note 1, § 19.5.

[24] 187 Miss. 159, 192 So. 431 (1939).

[25] *Id.* at 166, 192 So. at 432.

[26] 168 Miss. 408, 150 So. 794 (1933).

[27] *Id.* at 411, 150 So. at 794.

[28] *Id.* at 412, 150 So. at 795.

> by the intention with which it was annexed. This intention usually is to be gathered from the circumstances surrounding the annexation and the interest in the realty of the person by whom the annexation was made. One sometimes controlling circumstance where the annexation was made by the owner of the realty is whether the article was annexed for the more convenient and profitable use of the realty itself, for the general purpose for which a person making the annexation intended to use it.
>
> . . . The exact question here presented was decided in Richardson v. Borden, . . . wherein the court held the gin stands to be part of the realty. That case is controlling here, even if we doubted its soundness, which we do not.[29]

The court further held that the fact the owner of the gin was using the gin to clean more of others' cotton than his own was insufficient to change the result.[30]

Richardson v. Borden,[31] considered controlling in the *Love* case, was a replevin action brought by the grantor of land against his grantee to recover a gin stand on the land. The deed described the land but made no mention of the gin stand.[32] The question was whether "the gin-stand was *a fixture*, and whether title to the gin-stand, in this instance, passed by the deed which conveyed the title to the real estate."[33] After noting the difficulty of applying certain and fixed rules to the classification of goods as fixtures or chattels due to the importance of the particular facts in each case,[34] the opinion asserted that,

> in determining the question whether a thing is a chattel or fixture, reference must be had to the *nature of the thing itself*; the position of the party placing it where found; the probable intention in putting it there, and the injury which would result from its removal; and we must also consider the object of the party in placing the article on the premises with reference to trade, agriculture, or ornament.[35]

Addressing the facts of the case, the court noted:

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[29] *Id.* at 411-12, 150 So. at 794 (citations omitted).

[30] *Id.* at 412, 150 So. at 795. The court refrained from deciding what would be the rule for a case where

> the owner of land operates a cotton gin thereon primarily for commercial purposes and uses it incidentally to gin a small amount of cotton raised on other land composing a part of the tract on which the gin is situated . . . .

Id.

[31] 42 Miss. 71 (1868).

[32] *Id.* at 74.

[33] *Id.* at 75 (emphasis in original).

[34] *Id.*

[35] *Id.* at 75-76 (emphasis in original).

> [T]he article in controversy was in its very nature adapted to the business for which the lands were used. The party who annexed it when he put it there must have intended it should remain as long as it continued serviceable, as the convenience and usefulness of his cotton plantation would have been seriously impaired by its removal.
>
> The gin-stand is not only a highly necessary article, but may be declared to be an indispensable one.[36]

Citing several similar cases from other cotton-growing states, the court concluded that the gin stand was a fixture and passed with title to the realty.[37]

The sparse Mississippi authority for resolving the question of what passes by inheritance to an heir or by devise to a devisee thus seems consistent with the general American rule.[38] The question is controlled by determining the intention with which the owner affixed the goods to the land.[39] This intention is to be judged objectively, taking into consideration the nature of the goods, their functional relation to the land, and any other logically relevant data.[40] When the thing affixed makes the land more useful to the owner, however, there is a strong presumption that a permanent addition to the land was intended,[41] even though the goods could easily be removed and were used partly for other purposes.[42]

As authority for the determination of what goods attached to land pass under a devise in a will, the *Winn* court relied on *Love*,[43] which involved the question of whether goods attached to land passed under a deed of trust. *Love*, in turn, relied on *Richardson*, where the question to be determined was what goods attached to land pass under a deed conveying the land.[44] These situations are thereby treated as inter-

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[36] *Id.* at 76.

[37] *Id.* at 77.

[38] *See* 5 AM. LAW PROP., *supra* note 1, § 19.5.

[39] *See* Love v. Union Cent. Life Ins. Co., 168 Miss. 408, 411-12, 150 So. 794 (1933); Richardson v. Borden, 42 Miss. 71, 75-76 (1868). The intention test is more clearly stated in *Love* than in the earlier case of *Richardson*. Nonetheless, the *Richardson* opinion strongly emphasizes the element of the owner's intention in placing the goods on the land.

[40] *E.g.*, *In re* Voight-Pros't Brewing Co., 115 F.2d 733, 735-36 (6th Cir. 1940); Bell v. Bank of Perris, 52 Cal. App. 2d 66, 125 P.2d 829, 834-35 (4th Dist. Ct. App. 1942); M.P. Moller, Inc. v. Wilson, 57 P.2d 1344, 1346-47 (2d Dist. Ct. App. 1936), *modified*, 8 Cal. 2d 31, 63 P.2d 818 (1936); Warrington v. Hignutt, 42 Del. 274, 31 A.2d 480, 482 (Del. Super. 1943); Citizens Bank v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N.E.2d 444, 448 (1940); *see* 5 AM. LAW PROP., *supra* note 1, § 19.6, at 26.

[41] Teater v. Good Hope Dev. Corp. 14 Cal. 2d 196, 93 P.2d 112, 118 (1939); Lesser v. Bridgeport-City Trust Co., 124 Conn. 59, 198 A. 252, 254 (1938); Holland Furnace Co. v. Trumbull Sav. & Loan Co., 135 Ohio St. 48, 19 N.E.2d 273, 275-76 (1939); *cf.* Southern Cal. Tel. Co. v. State Bd., 12 Cal. 2d 127, 82 P.2d 422, 426 (1938).

[42] Gar Wood Indus., Inc. v. Colonial Homes, Inc., 305 Mass. 41, 24 N.E.2d 767, 771 (1940); Marine Midland Trust Co. v. Ahern, 16 N.Y.S.2d 656, 659 (Sup. Ct. 1939).

[43] 168 Miss. 159, 192 So. 431 (1939).

[44] 42 Miss. 71 (1868).

changeable, all turning on the same issue to be resolved by the same test, a frequent assumption in American law.[45] Yet these "common ownership" cases involve instances in which the goods were attached to the land by the owner of both the goods and the land. Therefore, the special strains on the assumption of interchangeability of "fixtures" decisions arising in the "divided ownership" cases are not present.

B. Vendor v. Purchaser

When the owner of land affixes chattels to it and later conveys the land without expressly indicating whether the goods previously affixed are also intended to be transferred, whether those goods pass under the deed is determined by whether they have become fixtures. If the goods are deemed to be fixtures, they pass with the real property; otherwise they remain the property of the grantor.[46]

The test usually applied to resolve the question whether the goods have become fixtures is the "intention" test: The intention of the landowner at the time he affixed the chattels judged by what may reasonably be supposed to have been his intention, in light of the nature of the thing affixed, the method of affixation, and the suitability of the article for the use to which the land is devoted.[47] Express language in the deed indicating that specific items are or are not to be included in the transfer will, of course, control.[48]

It is arguable that a test based on the owner's intention at the time of affixation focuses on the wrong intention at the wrong time and that the question should be what the purchaser could reasonably understand he was getting at the time of the conveyance. The results are generally satisfactory, however, in that they do usually give the purchaser what he could reasonably expect to receive in the absence of more explicit agreement.[49]

Two of the three Mississippi cases of this type are consistent with the above generalizations. The third may be reconcilable, but only with

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[45] *See* 5 AM. LAW PROP., *supra* note 1, § 19.7, at 28; § 19.8, at 32.

[46] *See, e.g.*, Southern Pac. Co. v. Riverside County, 35 Cal. App. 2d 380, 95 P.2d 688 (4th Dist. Ct. App. 1939); Burpee v. Athens Production Credit Ass'n, 65 Ga. App. 102, 15 S.E.2d 526 (1941); Currin v. Milhollin, 53 Ga. App. 270, 185 S.E. 380 (1936); Bibeault v. Hefgold Realty Corp., 21 N.Y.S.2d 970 (1936), *aff'd*, 250 App. Div. 761, 295 N.Y.S. 125 (1937).

[47] *See, e.g.*, Daly Bros. Shoe Co. v. H. Jacob & Sons, 49 F. Supp. 118 (M.D. Pa. 1943); Peed v. Bennett, 114 Ind. App. 412, 52 N.E.2d 629 (1944); Bastas v. McCurdy, 266 S.W.2d 49 (Mo. App. 1954).

[48] *E.g.*, Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949); *see, e.g.*, Daly Bros. Shoe Co. v. H. Jacob & Sons, 49 F. Supp. 118 (M.D. Pa. 1943); Mead v. Collins Realty Co., 75 A.2d 705 (Del. Super. 1950).

[49] *See* 5 AM. LAW PROP., *supra* note 1, § 19.6, at 26.

considerable effort. *Richardson v. Borden*,[50] the earliest case in point, has already been discussed[51] and is quite in line with cases elsewhere.

The case of *Boone v. Mendenhall Lumber Co.*,[52] however, is enigmatic. A steam engine was placed by its owner on his land to furnish power for a planing mill. The engine was attached to a concrete foundation by eight steel bolts, and a building constructed over it. The owner conveyed the land by a deed which apparently made no mention of the engine. A judgment creditor of the landowner levied execution on the engine, and the plaintiff bought it at the execution sale. The plaintiff brought a replevin action against the grantee to recover the engine. Despite its affixation to the land, the plaintiff contended that the engine remained personal property, did not pass under the deed, and could, therefore, be sold in execution of a judgment against the landowner. The trial court gave a peremptory instruction in favor of the grantee.[53] On appeal, the decision was reversed and the case remanded. The critical question was whether the engine had been so annexed to the realty as to become a fixture. The court held it had not: "Tested by the rules announced in *Weathersby v. Sleeper*, . . . it cannot be said that the character of the engine was changed from that of a chattel to realty."[54]

Boone naturally leads to further inquiry: What are the rules of *Weathersby v. Sleeper*?[55] Decided in 1869, *Weathersby* involved a dispute over a steam saw and grist mill. The machinery, owned by Solomon Weathersby, was loaned to his brother Lewis Weathersby, with the understanding that Lewis would install it on land to be furnished by Sleeper. Apparently Lewis Weathersby and Sleeper planned to operate the machinery in partnership. Lewis turned the machinery over to Sleeper, who installed it on land which he possessed but did not own. The owner of the land consented to the installation. Subsequently, Solomon Weathersby sold the machinery to Margaret Weathersby, and she demanded possession from Sleeper. Sleeper refused to give it up, claiming the right to retain it until he was reimbursed for advances made to Lewis. Margaret brought a replevin action and the sheriff executed the writ without requiring a bond of the plaintiff. A county court gave judgment for plaintiff, which was reversed by the circuit court.[56] Affirming the circuit court's judgment,[57] the High Court of Errors and Appeals stated that the sheriff's failure to require a bond from the plaintiff was

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[50] 42 Miss. 71 (1868).

[51] See notes 30-31 & accompanying text *supra*.

[52] 97 Miss. 554, 52 So. 584 (1910).

[53] *Id.* at 556, 52 So. at 584.

[54] *Id.*

[55] 42 Miss. 732 (1869).

[56] *Id.* at 736-37.

[57] *Id.* at 743.

a statutory violation entitling defendant to a nonsuit.[58] The court, however, went on to consider whether replevin would lie to recover the machinery in question and ruled it would since the articles sought to be replevied were personal property, not real property.[59]

In an extended discussion of the law of fixtures, the court observed that questions respecting fixtures had arisen principally in disputes between heir and executor, vendor and vendee, mortgagor and mortgagee, and landlord and tenant.[60] The court also noted that "the rule obtains with most rigor in favor of the inheritance" and in favor of the vendee and the mortgagee, but that as between landlord and tenant, "greater latitude and indulgence are extended in respect to fixtures erected by the tenant for the purposes of trade, called trade fixtures, which he may remove at any time before the termination of his tenancy."[61] The court continued:

> Whether an article is personal property or a fixture, must be determined by taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and other attending circumstances indicating the intention to make it a temporary attachment or a permanent accession to the realty. And inasmuch as it requires a positive act on the part of the person making the annexation to change the nature and legal qualities of a chattel into those of a fixture, the intention to make the article a permanent accession to the realty must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel. In some instances the intention to make the article a fixture may clearly appear from the mode of attachment alone, as where a removal cannot be made without serious injury to the property by the act of severance. But where the attachment is but slight, and does not enter into the physical structure of the realty, this intention must be gathered from the nature of the article and the other attending circumstances.
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> The criterion of a fixture above mentioned is subject to qualification in some respects. Whatever would otherwise be the rights of the parties connected with an article which has been attached to the realty, they are liable to be controlled by an established custom or special agreement of the parties. The parties are presumed to be cognizant of an existing usage or custom, and to act with a tacit reference to it. And an article attached to the land may be a fixture or a chattel, according to the special agreement of the parties.[61.1]

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[58] *Id.* at 739.
[59] *Id.* at 742-43.
[60] *Id.* at 741.
[61] *Id.*
[61.1] *Id.* at 741-42.

The court proceeded to classify the steam saw and grist mill as personal property on the following grounds:

> The means by which the mill with engine and boilers were attached to the realty, and those used to keep the machinery steady and in its proper place for use, were such as to admit of its removal without injury to any property, or even inconvenience.
>
> . . . Neither the mode of the annexation nor the use to which it was applied indicated any design to change the character of the property. The nature of the property itself, the removal of it from place to place, its liability to be taken away or disposed of, show that it was not intended to be made a permanent accession to the freehold.
>
> It has been repeatedly held, that a building or other fixture, which is ordinarily a part of the realty, is personal property when placed on the land by another by contract or by consent of the owner. And it need not be a trade fixture.[62]

As a precedent for the decision in *Boone*, the *Weathersby* decision is weak, for there are important distinctions between the two cases. First, in *Weathersby* the goods were not affixed to the land by the owner of the land but by a bailee of the goods, though the affixation was made with the consent of both the bailor and the landowner.[63] The case is within the "divided ownership" classification and potentially involved a question not present in the "common ownership" case: Whether the original owner of the goods lost his title to the landowner by accession. Had the court in *Weathersby* decided the machinery had become fixtures, it would have been indicating, at least by implication, that the machinery was no longer the property of Solomon Weathersby at the time he attempted to sell it to Margaret Weathersby. A court might be more reluctant to find a change in ownership by accession in the absence of a clear demonstration of intention to transfer title than it would where no change in ownership by accession is involved, as in *Boone*. Secondly, the question in *Boone* was whether title to the goods, after they had been affixed to the land, would be transferred by a conveyance which described only the land.[64] In *Weathersby* the question was whether replevin would lie to recover goods where neither of the contending parties, so far as appears, based a claim to the goods on their character as

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[62] *Id.* at 742-43 (citations omitted). The boilers were encased in brick for support and were surrounded by a wooden framework rooted in the ground, from which iron bolts ran to the boilers to help support them; the engine was bolted down to heavy timbers set into the earth; pipes led from the boilers to a pond and a well; and all machinery was connected together "in the usual way for steam mills." However, the machinery could be "taken and moved without material damage to the freehold." *Id.* at 740.

[63] *Id.* at 740-41.

[64] 97 Miss. at 555, 52 So. at 584.

real property.[65] Only if it is assumed that goods affixed to land must be treated either as personal property or real property *for all purposes* would it logically follow that the *Weathersby* precedent should control the *Boone* decision. Yet the opinion in *Weathersby* expressly recognizes that whether goods are fixtures depends, at least partly, on who the opposing parties are[66] (and, presumably, what issue has to be settled in order to resolve their dispute). Finally, the whole *Weathersby* treatment of the "fixtures" question appears to be dictum.

The court in *Boone*, however, did not say that it was following *Weathersby*, but rather that it was testing the fixtures claim "by the rules announced in *Weathersby v. Sleeper*."[67] Which rules were referred to one can only conjecture. Perhaps a clue appears in appellant's argument, reported with the decision but not referred to in the opinion, that

> Custom may also be appealed to as evidence of intention . . . and it is well known that throughout the piney woods sections of Mississippi, the saw mill and planing mill plants are constructed with a view to cutting up the timber in the immediate locality and then being moved to another site. Few mills . . . in this section . . . have remained at one place for any number of years; perhaps none, except those belonging to large syndicates.[68]

If the court was assuming, sub silentio, that the custom was as counsel argued, several conclusions could readily follow: (1) The intention of the owner of the goods in affixing the machinery to his land was not to make them a permanent adjunct to the land; (2) they were thus not fixtures; and (3) they did not pass with the land under a deed describing only the land. On that supposition, the principal "rule" of *Weathersby* guiding the decision in *Boone* would appear to be the general statement of the "intention" test, with its reference to the need to consider all "attending circumstances" at the time of attachment, and possibly the *Weathersby* court's insistence that doubts are to be resolved against a finding that the goods have become fixtures.[69] It is possible also that the *Boone* court was influenced by the statement in *Weathersby* that an "existing usage or custom" may control the question whether goods are fixtures.[70]

We have here an example of the Mississippi Supreme Court treating "common ownership" and "divided ownership" cases as interchangeable for purposes of fixtures law. While it may have done no harm

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[65] 42 Miss. at 736.

[66] *Id.* at 741.

[67] 97 Miss. at 556, 52 So. at 584.

[68] *Id.* at 555. (The attorney's arguments are not included in the Southern Reporter.)

[69] 42 Miss. at 742.

[70] *Id.*

in *Boone*, where it may have been a reasonable inference that the machinery was intended as a temporary attachment to the land and that the grantee under the deed should have realized it was temporary, it should be noted that the court's discussion in *Weathersby* may well have been shaped by the "divided ownership" aspect of the case. It is to be suspected that the court's emphasis on a requirement that "intention to make the article a permanent accession to the realty must affirmatively and plainly appear",[71] arose from the awareness that treating the goods as fixtures would lead to the logical conclusion that ownership of the goods had changed. Where no change in ownership is involved, as in the *Boone* case, there is less reason to be so hesitant about finding the goods to be fixtures. Similarly, the *Weathersby* court's references to "established custom" and "special agreement of the parties,"[72] read in the light of the facts of the case, would appear to be focusing on the question of what agreement might have been made between the landowner and the person attaching the goods to the land. Where the owner of goods affixes them to his own land, no such agreement can be involved.

A third Mississippi grantor-grantee case is *Crumbley Grocery Co. v. Ferguson*,[73] also a replevin action. Edwards erected a brick building for use as a general mercantile store. To equip the building he installed a number of large wooden counters and racks, fastening them only to a base which rested on the concrete floor. This equipment could be removed without physical injury to the building or equipment. The real property was subsequently conveyed to Ferguson by a warranty deed, which made no mention of the counters and shelves. Edwards continued to operate his mercantile business as Ferguson's tenant using the wooden counters and racks. Edwards later executed a deed of trust covering the equipment alone to Crumbley Grocery Company. Edwards was adjudicated bankrupt, and the grocery company brought a replevin action to establish its right as against Ferguson to the counters and shelves. The grocery company appealed a circuit court decision in Ferguson's favor, the parties stipulating that the sole question to be decided on appeal was whether title to the property had passed to Ferguson under Edwards' deed.[74]

The supreme court affirmed, ruling Ferguson had indeed acquired title to the goods under Edwards' conveyance.[75] The court reasoned that the "rule" of *Richardson v. Borden*[76] necessitated the conclusion that the goods were fixtures:

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[71] *Id.*

[72] *Id.*

[73] 159 Miss. 861, 132 So. 737 (1931).

[74] *Id.* at 867, 132 So. at 738.

[75] *Id.* at 870, 132 So. at 739.

[76] 42 Miss. 71 (1868).

> [T]he intention of the party in placing the counters and shelving in the store was that they should become a part of the store as used in the conduct of business therein. When Edwards conveyed to Ferguson the lot and store building, we think he conveyed, as part of the realty, the counters and shelving and the property embraced in the replevin suit.[77]

The court pointed out that if the goods had been installed by a tenant, the result may have been different.[78]

There are several interesting features about *Crumbley*. First, neither *Weathersby* nor *Boone* is cited. The *Weathersby* case is readily distinguishable as a "divided ownership" case. *Boone*, however, is not only a "common ownership" case, but also involves the question of what goods affixed to land pass with a conveyance of the land.[79] Perhaps *Boone* was considered an embarrassing precedent, best ignored. That *Boone* has seldom been cited as authority in subsequent cases may be supportive of this interpretation.[80] Second, the facts of *Crumbley* suggest an issue not present in *Richardson*. In *Richardson* the litigation was between the grantor and grantee of land and presented the sole question whether title to the goods involved had passed to the grantee under the land deed.[81] *Crumbley* involved litigation between the grantee of land and one to whom the grantor had undertaken to mortgage the goods after conveyance of the land, yet while the grantor was still in possession of both the land and the goods.[82] Potentially, there was an issue as to the grantor's power to divest his grantee of ownership of the goods in these circumstances, even if title to them had passed to the grantee under the deed. However, the supreme court did not consider that issue, the parties to the appeal having stipulated that the only question to be decided on appeal was the effectiveness of the deed to pass title to the goods.[83] Third, there were several facts which might have been thought relevant to the question of whether the goods were fixtures but which,

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[77] 159 Miss. at 868, 132 So. at 738.

[78] *Id.*

[79] 97 Miss. at 555, 52 So. at 584.

[80] Only two citations of *Boone*, can be found. One is in American Laundry Machine Co. v. Citizens Nat'l Life Ins. Co., 107 Miss. 108, 65 So. 113 (1914), where the court seems to have been led astray by the *Boone* decision. See notes 123-31 & accompanying text *infra*. The other appears in Love v. Union Cent. Life Ins. Co., 168 Miss. 408, 150 So. 794 (1933), (see notes 26-30 & accompanying text *supra*) where the *Boone* case is cited with several other decisions for the general proposition that affixation by the owner of the land for the more convenient use of the land points toward a finding that the goods have become fixtures.

[81] 42 Miss. at 75.

[82] 159 Miss. at 866-67, 132 So. at 737-38.

[83] *Id.* at 867, 132 So. at 738. The power of the grantor to divest the grantee of title in these circumstances is discussed in part I (*c*) *infra*.

so far as the court's opinion reveals, did not enter into the decision. After Edwards conveyed the realty to Ferguson, the store equipment was assessed to him, and not Ferguson, as personal property, and he paid taxes on it for 2 years.[84] These facts strongly suggest that Edwards and Ferguson considered the equipment to be outside the coverage of the deed, which could lead to the conclusion that the deed should not be interpreted as conveying the goods. On the other hand, before Edwards sold the property to Ferguson, he gave a bank a deed of trust covering the real property and delivered to the bank an insurance policy with a loss-payable clause covering the store *and* the equipment in it.[85] This suggests that Edwards considered the equipment, as well as the building, to be within the coverage of the deed of trust. These indications of intention are, of course, of debatable significance. The court's failure to discuss them is probably due to its emphasis on the intention with which the goods are affixed to the land,[86] not the intention at the time of the giving of a subsequent deed of trust or conveyance. This is consistent with the generally prevailing test in vendor-purchaser cases,[87] though as has been noted, it seems sounder to ask what the purchaser should reasonably have understood was being conveyed to him at the time of the conveyance. If this test were used, the evidence of the manner in which the goods were assessed for tax purposes would seem to be relevant.

Finally, the *Crumbley* decision illustrates the relative unimportance of the manner of affixation of the goods to the land. "Fixture" definitions usually speak of goods "affixed", "annexed", or "attached" to land,[88] and cases involving fixture questions often describe in elaborate detail the way the goods involved were "affixed", "annexed", or "attached."[89] These details appear to be of relevance, at least in American law today, simply as circumstantial evidence of the "intention" the courts seek. Once placed on the premises goods can be treated as "af-

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[84] *Id.* at 866, 132 So. at 738.

[85] *Id.* at 867, 132 So. at 738.

[86] *Id.* at 868, 132 So. at 738.

[87] See notes 46-49 & accompanying text *supra*.

[88] *See, e.g.*, Bell v. Bank of Perris, 53 Cal. App. 2d 66, 125 P.2d 829 (4th Dist. Ct. App. 1942) (annexed); M.P. Moller, Inc. v. Wilson, 57 P.2d 1344 (2d Dist. Ct. App.) *modified*, 8 Cal. 2d 31, 63 P.2d 818 (1936) (attached); People v. Church, 57 Cal. App. 2d 1032, 136 P.2d 139 (Super. Ct. 1943) (affixed); Consolidated Warehouse Co. v. Smith, 55 Ga. App. 216, 189 S.E. 724 (1937) (attached); Menzenberger v. American State Bank, 101 Ind. App. 600, 198 N.E. 819 (1935) (annexed); Schofer v. Hoffman, 182 Md. 270, 34 A.2d 350 (1943) (affixed).

[89] *See, e.g.*, Elliott v. Tallmadge, 297 P.2d 310 (Ore. 1956); Messenger Pub. Co. v. Board of Property Assessment, Appeals & Review, 132 A.2d 768 (Pa. Super. 1957).

fixed" even though they are held to the land by nothing more than their own weight.[90]

C. *Mortgagor v. Mortgagee*

Generally, the question of when goods affixed to land by the owner are to be treated as subject to a mortgage on the land is answered by much the same techniques as are employed in vendor-purchaser cases, whether the affixation occurs before or after the mortgage is executed.[91] The question whether the goods became "fixtures" is determined on the basis of the apparent intention of the owner at the time of affixation.[92] When the affixation occurs before the mortgage is executed, the possibility that a mortgage will subsequently be given is assumed not to loom large in the owner's mind or influence his intention as to the relation between the land and the goods.[93] When the goods are affixed after the execution of the mortgage, it might be supposed the existence of the mortgage would have a bearing on the owner-mortagor's intention; he might desire not to make the goods permanent additions to the land, so as to prevent their being taken in the event of foreclosure. This "clue" to intention is generally ignored, however, because the assumption is that the owner does not intend to default and thus does not anticipate foreclosure.[94]

In principle, the critical time for determining intention as to what property is to be subject to the mortgage would seem to be when the mortgage is executed. Nevertheless, in order to avoid any suggestion that the mortgagor did not intend the goods to be subject to foreclosure, the courts insist on focusing on the intention of the owner at the time the goods are affixed to the land.[95] If the assumption is made that a

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[90] Crumbly Grocery Co. v. Ferguson, 159 Miss. 861, 132 So. 737 (1931); *see* M.P. Moller, Inc. v. Wilson, 57 P.2d 1344 (2d Dist. Ct. App.), *modified*, 8 Cal. 2d 31, 63 P.2d 818 (1936).

[91] *See* 5 Am. Law Prop., *supra* note 1, § 19.7, at 28; *cf.* Lesser v. Bridgeport-City Trust Co., 124 Conn. 59, 198 A. 252 (1938); Westmore Supply Co. v. Frum, 316 Ill. App. 306, 44 N.E.2d 949 (1912). *But cf.* Metropolitan Life Ins. Co. v. Kimbal, 163 Ore. 31, 94 P.2d 1101 (1939); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941).

[92] *E.g.*, Janky v. Ellis Silk Hosiery Co., 16 F. Supp. 927 (E.D. Pa. 1936); Anderson v. Perpetual Bldg. & Loan Ass'n, 172 Md. 94, 190 A. 747 (1937); Fuson v. Whitaker, 28 Tenn. App. 338, 190 S.W.2d 305 (1945). *But cf.* Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941).

[93] *See* 5 Am. Law Prop., *supra* note 1, § 19.7, at 28-29.

[94] *See* Equitable Life Assurance Soc'y v. Chapman, 225 Iowa 988, 282 N.W. 355 (1938); Anderson v. Perpetual Bldg. & Loan Ass'n, 172 Md. 94, 190 A. 747 (1937); Snedeker v. Warring, 12 App. Div. 170 (N.Y. 1854); Fuson v. Whitaker, 28 Tenn. App. 338, 190 S.W.2d 305 (1945).

[95] *E.g.*, Lesser v. Bridgeport-City Trust Co., 124 Conn. 59, 198 A. 252 (1938); Metropolitan Life Ins. Co. v. Jensen, 69 S.D. 225, 9 N.W.2d 140 (1943).

mortgagor does not expect to default (his actual, subjective intention being irrelevant), the focus makes little practical difference and serves to protect the mortgagee's reasonable expectation as to what will secure his claim where the goods have already been affixed at the time the mortgage is executed.

From the standpoint of protecting the reasonable expectations of the mortgagee, the test used is unnecessary when the goods are affixed after the mortgage has been executed, since the mortgagee will not usually have bargained for the additional security. If the goods can be removed without decreasing the value of the security bargained for, the mortgagee is adequately protected. A small minority of courts have departed from the standard test in such cases.[96] It may be stated in support of the majority rule, however, that it tends to prevent waste of resources and damage to trade which the removal of the goods may cause.

Where goods are affixed to land by one in possession under an executory contract to buy, the courts usually treat the vendor as if he were a mortgagee and the vendee as the owner-mortgagor.[97] Thus, the vendee, who presumably intends to pay the price of the land, will have his annexations treated as fixtures subject to the vendor's property claim, in the same circumstances as if the vendee held legal title to the land.[98]

Annexations of the owner of a qualified fee are usually treated as part of the land, reverting with the land upon the occurrence of the divesting event.[99]

The holding in the Mississippi case of *Tate v. Blackburne*[100] is consistent with the majority approach described above, though there is what might be considered an alternative holding. Tate sold his cotton plantation to Harrell, reserving a vendor's lien for the purchase money. After conveyance and transfer of possession, Harrell placed upon the land equipment for a cotton gin. The machinery was apparently fastened and connected together in normal fashion. Harrell testified that the machinery was portable and that it was his secret intention at the time of the installation to use the machinery on two plantations, moving

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[96] *See* 5 AM. LAW PROP., *supra* note 1, § 19.7, at 30.

[97] *E.g.*, Martindale v. Bowers Beach Corp., 13 Del. Ch. 288, 118 A. 299 (1922); McLaughlin v. Nash, 96 Mass. (14 Allen) 136 (1867).

[98] *E.g.*, Ogden v. Stock, 34 Ill. 522 (1864); Westgate v. Wixon, 128 Mass. 304 (1880); Taylor v. Collins, 51 Wis. 123, 8 N.W. 22 (1881).

[99] *E.g.*, Williams v. Kirby School Dist., 207 Ark. 458, 181 S.W.2d 488 (1944); St. Louis Sw. Ry. v. Curtis, 113 Ark. 92, 167 S.W. 489 (1914); Miller v. Common School Dist., 231 Minn. 248, 43 N.W.2d 102 (1950). *Contra*, Sewell v. Reinhardt, 203 Okla. 239, 219 P.2d 996 (1950).

[100] 48 Miss. 1 (1873).

it from one to the other as needed, although the equipment was in fact never moved.

Some years after the equipment was installed on the plantation, Harrell sold the equipment to Blackburne, who agreed to leave the machinery in place for the next two crops. Still owing the purchase price to Tate, Harrell became bankrupt, and the land was sold back to Tate. Shortly thereafter, Blackburne removed the ginning machinery.[101] Tate subsequently sued Blackburne in trespass to recover the value of the machinery. Verdict and judgment were for defendant.[102]

On appeal, the supreme court reversed and remanded, finding the verdict contrary to the law and the facts and holding that the goods were fixtures.[103] At the outset, the court's lengthy discussion noted:

> In the whole range of jurisprudence there is, perhaps, no subject more difficult of definite rules than the matter of fixtures. The common law rule, it is true, is precise, and, were there no exceptions thereto, would be conclusive upon this case. But many exceptions have been sustained. . . . In favor of tenants, the greatest liberality is indulged, while, as between vendor and vendee, and mortgagor and mortgagee, the strictest construction obtains; and this latter rule must be applied here, as against the claim that the articles in controversy are chattels.[104]

The "common law rule" referred to is probably the English rule that everything affixed to the realty becomes part of the realty.[104.1] The court quoted the following from Professor Hill on *Fixtures*:[105]

> Whether articles are personal property or not must . . . be determinable, and plainly appear from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and in some instances perhaps other attending circumstances indicating the intention to make it a temporary attachment or a permanent accession to the realty.[106]

Armed with this somewhat more useful test reflecting the American emphasis on intention, the court turned to the case at bar:

> [A]n inspection of the property, its nature, mode of attachment, use,

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[101] *Id.* at 4.

[102] *Id.*

[103] *Id.* at 10. Tate appealed on the following grounds: (1) the verdict was contrary to the law and the evidence; (2) the lower court erred in overruling Tate's motion for new trial; and (3) the lower court erred in instructing the jury that if Harrell intended to erect the machinery so it could be moved from one place to another, the equipment was not fixtures, and Harrell could sell it. *Id.* at 4.

[104] *Id.* at 4-5. *See* notes 46-49 *supra*.

[104.1] *See generally* 5 AM. LAW PROP., *supra* note 1, § 19.1, at 3-4.

[105] J. HILL, LAW OF FIXTURES (1867).

[106] 48 Miss. at 9, *quoting* J. HILL, *supra* note 105, at 5.

> the relation of the party making the annexation, the circumstances attending such annexation, the silence of the party as to an intention of removal, and of the sale, and its non-removal until after the purchase of the realty by Tate, who was also the mortgagee of Harrell, all indicate a permanent accession to the realty.[107]

Elsewhere in the opinion, the court emphasized the importance of the machinery in question for the successful working of the land for the purpose to which it was devoted and the fact that Harrell was placing the goods on his own land.[107.1]

Harrell's secret intention to move the gin machinery between two plantations from time to time was dismissed as irrelevant.[108] The alleged portability of the machinery was also dismissed, apparently on the ground that the machinery was no more portable than earlier models of cotton ginning equipment which had frequently been found to be fixtures.[109]

The court further noted that some cases[110] had held goods not to be fixtures because of an explicit agreement between the person affixing the goods to the land and the person who subsequently claimed them as realty; however, no such agreement existed between Tate and Harrell.[111]

A possible alternative basis for the decision is suggested by a passage near the end of the opinion:

> Certainly the defendant possessed only the rights of Harrell, who, upon the facts stated in the record, could not pretend to a legal right to this property, as chattels, after the land had passed into the possession and ownership of Tate. Even as between landlord and tenant, the assertion of a right to remove this property was too late, as, if such had been the relation of the parties, the right of severance and removal ceased with the term.[112]

The import of this passage is anything but clear. It may mean that although the machinery could be regarded as personalty while Harrell remained in possession of the land, it became realty, or at least Tate's property, when Tate bought the land and took possession. This interpretation gains some support from the court's further statement that,

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[107] 48 Miss. at 9-10.

[107.1] *Id.* at 6, 10.

[108] *Id.* at 5.

[109] *Id.* at 10.

[110] Richardson v. Borden, 42 Miss. 71 (1868); Ford v. Cobb, 20 App. Div. 344 (N.Y. 1859); Murdock v. Gifford, 18 App. Div. 28 (N.Y. 1858); Mott v. Palmer, 1 App. Div. 564 (N.Y. 1849).

[111] 48 Miss. at 10.

[112] *Id.*

"[a]n actual severance and sale by Harrell, while holding the legal title, would have presented a totally different case from that now before us."[113] However, assuming that the equipment was personalty as long as Harrell had possession of it and the land, it is difficult to understand why it should become realty, or the property of the new owner of the land, when Harrell lost possession after selling the machinery to Blackburne.[114]

Comparing the other reasoning of *Tate v. Blackburne*[115] with American law generally,[116] we note that in *Tate* the intention of the annexor, as objectively inferrable from the circumstances, controlled the classification of the goods.[117] The intention sought is one to make the goods a permanent addition to the land.[118] No attention is given by the court to the fact that the annexation was made after the mortgage interest had been created.[119] These aspects of the opinion are quite consistent with the majority view. The *Tate* opinion is not entirely clear whether it is the intention of the annexor at the time of the annexation that controls or his intention at some earlier or later time. Most of the reasoning, however, seems to focus on the time of annexation, and it may well be that the references to events at other times are added simply to demonstrate that even if the intention test were applied at such times, the result would be the same (a sort of judicial overkill of which the passage quoted in the preceding paragraph may be another example).

The court in *Tate* gave little attention to any equities Blackburne may have possessed. The court seemed to assume Blackburne's rights could rise no higher than Harrell's because he claimed title through Harrell, so that the issue became simply whether Tate could have asserted his mortgage lien against Harrell with respect to the ginning machine.[120] Perhaps it had been shown that Blackburne knew all the facts relevant to the fixture determination when he bought the machinery from Harrell; perhaps it was simply assumed that he did. Perhaps it was considered immaterial what he knew; that if the goods were fixtures as between mortgagor and mortgagee the mortgagee's interest in them necessarily prevailed against any purchaser of them from the mortgagor. There seems to be little point in conjecturing further on the court's reasoning, but it may be in order to point out that the injection of a third-party claimant into the picture, claiming the goods as person-

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[113] *Id.*

[114] *See id.* at 4.

[115] 48 Miss. 1 (1873).

[116] See notes 46-49 & accompanying text *supra*.

[117] 48 Miss. at 10.

[118] *Id.* at 6.

[119] *Id.* at 3-4.

[120] *Id.* at 10.

alty, adds a new dimension to the fixtures problem. It may be perfectly clear that, as between mortgagor and mortgagee, the goods had sufficiently taken on the character of realty for the mortgagee to have an interest in them under his real estate mortgage. It is another question whether the mortgagee's claim should prevail over that of a person who purchased the goods from the mortgagor as chattels.

The court's general discussion of fixtures law involved some confusion of the English "annexation" test and the American "intention" test.[121] This phenomenon is typical of Mississippi cases in the transition period when American courts generally were shifting from the English test to the "intention" test.[122] It is not common in the more recent cases, but it occasionally crops up. In *Tate* no harm appears to have resulted from the confusion, as the court did in fact apply the "intention" test. The possibility of error, however, must be reckoned with.

A later mortgagor-mortgagee case, *American Laundry Machine Co. v. Citizens National Life Insurance Co.*,[123] appears to be inconsistent with general American law. The owner of a building and the land on which it stood installed machinery for a commercial laundry and conducted a laundry business on the premises. None of the machinery was necessary for the use of the building "as such,"[124] and all of it could be removed without injury to the building.[125] Thereafter, he executed a deed of trust on the lot to secure a loan made to him by an insurance company. The deed of trust evidently made no mention of the machinery in the building.[126] Subsequently he gave the plaintiff machine company a chattel mortgage upon the machinery in the building to secure a pre-existing debt. The insurance company foreclosed its deed of trust and bought the property at the trustee's sale. The insurance company claimed that the trustee's deed gave it title to the machinery in addition to the land and building. The plaintiff machine company brought suit to foreclose its chattel mortgage on the machinery and have the insurance company's claim adjudicated invalid. The trial court granted the relief asked as to part of the machinery but not as to certain items which were firmly fixed to the building for support and steadiness.[127]

The supreme court reversed, holding that the plaintiff machine company was entitled to all of the equipment:

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[121] See notes 8-10 & accompanying text *supra*.

[122] See notes 55-62 & accompanying text *supra*. *See also* Weathersby v. Sleeper, 42 Miss. 732 (1869).

[123] 107 Miss. 108, 65 So. 113 (1914).

[124] *Id.* at 112, 65 So. at 113.

[125] *Id.*

[126] *Id.*

[127] *Id.*

> Under the rule announced in *Weathersby v. Sleeper* . . . and applied in *Boone v. Mendenhall*, . . . it seems clear that the pieces of machinery in question were not fixtures in the sense that they became a part of the building in which they were placed, but that, on the contrary, they were placed in the building solely for the purpose of being used in connection with [the owner's] laundry business and remained and still are personal property.[128]

This decision raises more questions than it answers. Although there is reference to "the rule announced in Weathersby v. Sleeper,"[129] again we must ask: "Which rule?" On its facts *Weathersby* is clearly distinguishable. The goods there were affixed to the land by one not the landowner, a fact that entered into the court's reasoning in deciding that the goods remained personal property.[130] It may be that "the rule" referred to is simply the general statement of the "intention" test that appears in *Weathersby*.[131] If so, it is difficult to see why one installing machinery in his own building which he intended to operate as a laundry should not be considered to intend to make the machinery a permanent addition to the land.

Regarding the reference to *Boone* for its application of "the rule announced in Weathersby v. Sleeper," the discussion of *Boone* above[132] brought out the uncertainty of the rationale of that decision. It was suggested as a possible explanation that the court assumed that planing mill installations in the piney woods sections of Mississippi were commonly regarded as temporary. There is no suggestion in *American Laundry*[133] that any similar custom prevailed as to the machinery of commercial laundries.

Of possible importance in *American Laundry* is that prior to executing his deed of trust in favor of the insurance company, the owner asked the company to increase the amount of his loan, offering to include in his deed of trust the machinery in his plant. The insurance company refused on the ground that it "did not make loans on laundry machinery."[134] It is thus apparent that the deed of trust was not intended by the parties to cover the machinery. This may be the real reason for the court's opinion, though not openly acknowledged.[134.1]

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[128] *Id.*

[129] *Id.*

[130] 42 Miss. at 740-41.

[131] *Id.* at 742.

[132] See note 128 & accompanying text *supra*.

[133] 107 Miss. at 112, 65 So. at 113.

[134] *Id.* at 111, 65 So. at 113.

[134.1] Another possible, though questionable, explanation of the decision appears in the later case of M.L. Virden Lumber Co. v. Sherrod, 167 Miss. 297, 139 So. 813 (1932). There, *American Laundry Machine* was distinguished on the ground that the articles involved

Frederick v. Smith,[135] involved a number of items of household and farm equipment installed on a farm and in the residence on the property by Smith. At the time some of these items were affixed to the land, Smith was a tenant.[136] After having been a tenant for 2 years, Smith bought the farm. In 1920, he and his wife executed a deed of trust covering the land in favor of an insurance company to secure an indebtedness. That same year Smith installed a kitchen sink in the farmhouse. (It is not clear whether the installation occurred before or after the execution of the deed of trust.) In 1924, the deed of trust was foreclosed, and the property was sold to the insurance company. Smith and his wife continued in possession of the premises as tenants. Frederick bought the property from the insurance company in 1925. The Smiths moved off the farm the following year, taking with them the kitchen sink. Frederick, who brought replevin to recover it, lost in the circuit court, and appealed. The supreme court reversed.[137]

Quoting the general tests for fixtures stated in *Richardson v. Borden*[138] and *Weathersby v. Sleeper*[139] and quoting the passage of *Richardson* recognizing a distinction between vendor-vendee and mortgagor-mortgagee cases, on the one hand, and landlord-tenant cases, on the other, the court had no difficulty concluding that the kitchen sink, having been affixed by the owner of the land and adapted to the residential use to which the building was devoted, was a fixture subject to the deed of trust.[140]

The decision seems quite orthodox and in line with the approach of the majority of American courts.[141] To be noted are the implicit assumption that grantor-grantee and mortgagor-mortgagee cases can be treated as interchangeable and the lack of concern whether the affixation of goods to the land had occurred before or after the execution of the deed of trust.

Frederick is relied on for its statement of law in the later case of *M.L. Virden Lumber Co. v. Sherrod*.[142] Although the statement of facts is difficult to follow, the story appears to be that Sherrod, in 1928, purchased a lot and warehouse from M. L. Virden, an individual, receiv-

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in that case were not "trade fixtures." *M. L. Virden Lumber Co.* is dealt with more fully later in the text. See notes 142-46 & accompanying text *infra*.

[135] 147 Miss. 437, 111 So. 847 (1927).

[136] *Id.* at 441, 111 So. at 847. So far as these items are concerned, there is a "divided ownership" aspect considered later. See notes 300-05 & accompanying text *infra*.

[137] 147 Miss. at 446, 111 So. at 849.

[138] 42 Miss. 71 (1868).

[139] 42 Miss. 732 (1869).

[140] 147 Miss. at 444, 111 So. at 848.

[141] See notes 91-99 & accompanying text *supra*.

[142] 167 Miss. 297, 139 So. 813 (1932).

ing a deed to the property, and executing in Virden's favor a deed of trust to secure notes for the purchase price. Sherrod shortly afterward sold the property to Dixie Warehouse. Sherrod or Dixie Warehouse, as owner, undertook to remodel the warehouse to make it a more modern facility for cotton seed storage. Virden Lumber Company supplied equipment installed in the course of the remodeling. Installation of the machinery required removal of parts of the floors and walls on the building and construction of supporting pillars. The machinery was firmly affixed to the building, and after its installation, the building could not have been used for any other purpose unless rebuilt.

After the goods had been installed, Dixie Warehouse sold them to Sherrod, who, in turn, sold them to Federal Cotton Seed Warehouse [Federal]. The deed of trust in favor of M. L. Virden was then foreclosed and the property sold and conveyed to him by the trustee. The lumber company subsequently sued to enforce a materialman's lien against the warehouse and the equipment in it for the price of the equipment it had furnished for the remodeling. The case developed into a contest between the plaintiff and M. L. Virden, on the one hand, and Federal on the other, as to whether the goods supplied by the plaintiff had been subject to M. L. Virden's deed of trust (which apparently described the land but not the equipment the lumber company had furnished), or rather, was free of the lien of the deed of trust.

Reversing a lower court decision in favor of Federal, the supreme court held that the equipment had become fixtures, and as such became subject to Virden's preexisting deed of trust on the land, becoming entirely Virden's property as purchaser from the trustee on foreclosure of the deed of trust, to the exclusion of any interest of Federal's:

> It is . . . indubitably established that the fixtures are so annexed to the building as to become a part thereof, and that same could not be removed and disconnected therefrom without damage to the building, which was undoubtedly a part of the freehold. These fixtures appear to be a part of the motive power equipped and annexed to the building for the purpose of better storing and cleaning seed and lighting the building. Generally speaking, the rule is that personal property such as fixtures and machinery annexed to the building in a manner so as not to be capable of being removed without damage to the building becomes a part of the building and freehold. . . . The rules governing this character of case in this state are set forth in Frederick v. Smith, ... These articles were not trade fixtures, and the case of American Laundry Machine Co. . . . is not in conflict herewith.[143]

The case seems quite consistent with the majority approach[144] ex-

[143] *Id.* at 303, 139 So. at 816.

[144] See notes 91-99 & accompanying text *supra*.

cept for the stress on the goods having been so affixed to the building that they could not be removed without substantial damage to the building. As we have seen, this is not an indispensable element to bring goods within the category of fixtures under Mississippi law,[145] though it undoubtedly strengthens the inference that the goods were intended to become permanent adjuncts to the land. In addition, the goods in this case were affixed by the owner and were installed to make the realty more useful for the purpose for which it was used. The case clearly involves goods added to the realty *after* a mortgage on the land was executed, where the court holds that they become subject to the preexisting mortgage, which is the majority view.[146] Finally, it appears from the court's treatment of *American Laundry Machine Co.* that it had by then become an embarrassment, to be distinguished away.

The case of *Layne Central Co. v. Gulf Coast Ice Co.*[147] brought out another twist in the "fixtures" concept. It dealt with artesian well equipment installed on land by the seller at the behest of the landowner, under an agreement that the goods should remain personal property until their full purchase price had been paid. It held that the seller's right to the goods, in order to enforce his purchase money lien, took precedence over the claim to them by the beneficiary of a deed of trust on the land which had been executed prior to the installation of the goods. Cases of this type will be considered below as "divided-ownership" cases. Although the goods was affixed to the land by the landowner in a sense, there is also involved the question whether the original owner of goods, who reserved an interest in them to secure his right to the purchase price, loses that interest by accession when the goods are affixed to the land.[148]

It has been noted that the courts usually treat a vendee in possession of land under an executory contract of sale as if he were a mortgagor, the vendor being considered the mortgagee.[149] This is true in Mississippi also.

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[145] See notes 115-22 & accompanying text *supra*.

[146] *See* Crumbley Grocery Co. v. Ferguson, 159 Miss. 861, 132 So. 737 (1931).

Love v. Union Central Life Insurance Co., discussed previously, was decided the year following *M.L. Virden Lumber Co.* It is quite orthodox, no particular attention being given to the question whether the goods could be removed from the land without substantial damage to the land or its structures. The main facts leading to the classification of the goods as fixtures apparently were that they were affixed by the owner of the land in aid of the use to which the land was devoted. In this case the goods were affixed to the land before the mortgage was given, and the holding was that they became subject to the mortgage even though the instrument described only the land as its subject matter. See notes 26-30 & accompanying text *supra*.

[147] 171 Miss. 94, 157 So. 84 (1934), *noted in* 7 MISS. L.J. 438 (1935).

[148] 171 Miss. at 99, 157 So. at 85-86.

[149] See notes 97-98 & accompanying text *supra*.

In *English v. Foote*,[150] Foote was in possession of a lot under a contract to buy it from Hooper. Foote had given Hooper two notes for the price, and Hooper had given Foote his bond to make title to the lot on payment of the notes. Foote employed English and Turner to work on the construction of a house on the lot. They did their work but were not paid. Foote defaulted on his notes to Hooper and surrendered possession of the lot to him. English and Turner then sued to enforce a mechanic's lien against the house. The mechanic's lien was held to be unenforceable, despite the fact that a statute granted a first lien to mechanics upon a house on which they had worked. The court said:

> It is very clear, however, that the lien can operate on nothing beyond the right of the person for whom the building was erected. . . . Foote had no right to the lot, except subject to that of the vendor, which under the circumstances *was at least equivalent to a mortgage*. . . . Indeed, it only amounted to a conditional sale, and if the contract were not complied with by the vendee, it might be rescinded by the vendor. In that event, the purchaser would not be entitled to the improvements, or to compensation for them. . . .
>
> As a general rule, whatever is annexed to the freehold becomes part of it, and cannot be severed from it. There are many exceptions to the rule, but it applies with all its strictness between vendor and vendee.[151]

The case should no longer be considered authoritative as to the priority between a mechanic's lien and a prior encumbrance, and its reliance on the "strict" rule for vendor-vendee cases seems wide of the mark (the issue in those cases being what property the vendor contracted to sell or in fact sold to the vendee). The vendor, however, is recognized as holding a position analagous to that of a mortgagee, and the implied holding that permanent improvements made by the mortgagor after execution of the mortgage feed the mortgage lien as fixtures is quite consistent with the majority rule,[152] as well as with most of the later Mississippi cases. This case, one of the earliest reported Mississippi fixtures cases, predates the advent of the "intention" test in American law and hence reflects the English approach.[153]

In *Perkins, Livingston & Post v. Swank*,[154] Swank, a tenant on Harper's plantation, contracted to buy the property from Harper. After the contract had been orally agreed upon, and perhaps after it was reduced to writing, Swank bought machinery on unsecured credit from Perkins, Livingston & Post [Perkins] and set it up on the plantation.

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[150] 16 Miss. 444 (1847).

[151] *Id.* at 451 (emphasis added).

[152] See notes 91-99 & accompanying text *supra*.

[153] See notes 4-7 & accompanying text *supra*.

[154] 43 Miss. 349 (1870).

Some months later Swank gave Perkins a note for the purchase price of the equipment, secured by a mortgage on the equipment. Because Swank failed to make rental payments due Harper, Harper attached the sawmill and engine. Perkins sued to enjoin Harper from proceeding further with the attachment and to foreclose their mortgage. Affirming a decree in favor of Harper, the court held that Perkins could not qualify as an innocent purchaser entitled to protection against a prior equity because (1) it took the mortgage as security for a preexisting debt and hence was not a purchaser for value and (2) it had notice that Swank had equitable title to the land, subject to a lien in favor of Harper to secure Swank's performance under the contract of sale. Furthermore, having become fixtures, the sawmill and engine were subject to Harper's equitable lien on the land when the mortgage to Perkins was executed. After reviewing the leading United States Supreme Court decision of *Van Ness v. Pacard*,[155] and pointing to the intention test as the leading test of fixtures, the opinion continued:

> We are inclined to the opinion that whatever fixtures Swank put on the land in his claim and right as purchaser, became part of the realty, and inured to the benefit of his vendor's equity, or lien on the land. The mortgagor, after forfeiture, especially, has but an equity of redemption; yet all improvements which are put on the property and attached to the freehold, become fixtures, and are part of the realty.
>
> If Swank had not changed his relation to the Harpers from that of tenant to that of vendee, we would have no difficulty in holding that he would have a right at the termination of his tenancy, to remove the mill, engine, and appurtenances, and that it would have been personalty, and that he had power to encumber it by mortgage or otherwise.[156]

The court added in dictum that Perkins would have had priority over Harper if it had taken its mortgage at the time of the sale of the equipment to Swank and before it became a fixture, for then its lien would have been prior in time to Harper's. That it had recorded its mortgage made no difference, because under the statute the recordation operated as notice only to subsequent purchasers and creditors, and the statute did not protect a recording mortgagee who took a mortgage with notice of a prior unrecorded lien.

This case is unsatisfactory in some respects. It is not clear whether Harper prevailed because the goods became fixtures before Perkins received its mortgage or because of the peculiar wording of the contract of sale between Harper and Swank. The opinion does seem to place chief reliance on the fixtures determination. The case also sloughs over the

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[155] 27 U.S. (2 Pet.) 137 (1829).

[156] 43 Miss. at 363.

reasoning by which the goods were found to have become fixtures by stating rules, then seemingly assuming that the rules produced a conclusion that the articles in suit were fixtures.

The case, however, does analogize the position of the vendor under an executory contract for sale of land to that of a mortgagee, the vendee being in the position of mortgagor.[157] The intention test, as applied in later cases, would appear to support a finding that the goods in this case had become fixtures. It could be assumed that Swank, the vendee, not expecting to default on his contract for the purchase of the land, would intend the goods to be permanent additions to the realty as if he were in fact its owner, and the machinery was adapted to the use to which he meant to put the land. As to the standing of the persons to whom Swank undertook to mortgage the machinery apart from the land, the case takes on a "divided-ownership" aspect, which will be explored later in this article.

D. Insurer v. Insured

A Mississippi case not readily fitted into the *American Law of Property* "common ownership" classification is *Fidelity-Phenix Fire Insurance Co. v. Redmond*.[158] In that case, a fire insurance policy covered a brick store building, but apparently not the personal property inside. After a fire destroyed ceiling fans and light fixtures within the building, the question arose whether they were within the coverage of the policy. It was held they were because they were fixtures and thus part of the building. *Richardson v. Borden*[159] and *Weathersby v. Sleeper*[160] were cited for their general statements of the tests for fixtures. *Richardson* was also relied on in regard to the "strict rule" being applicable as between executor and heir, vendor and vendee, and mortgagor and mortgagee, while the rule applicable to landlord and tenant is "relaxed and liberal" in favor of the tenant.

> [W]e think . . . the same rigorous and stringent rule should apply in favor of the insured and against the insurer. The testimony in this case shows that these fixtures were so attached to the building that they could not be readily removed without damaging or defacing it, and . . . as between the insured and insurer they became a part of the realty and were covered by the policy.[161]

Reference to the law of fixtures seems hardly necessary in this case.

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[157] See notes 97-98 & accompanying text *supra*.
[158] 144 Miss. 749, 111 So. 366 (1927).
[159] 42 Miss. 71 (1868).
[160] 42 Miss. 732 (1869).
[161] 144 Miss. at 765, 111 So. at 368.

The question was basically one of construction of the contract between the parties as to the scope of the coverage. The same result, however, would very likely have been achieved applying the rules of contract interpretation as they have evolved in insurance cases.

II. Divided Ownership Cases

The *American Law of Property* calls attention to the fact that courts, in discussing common-ownership cases, may speak of "accessions" to the land but are actually using the term "accession" in the broad sense of something "supplementary or incidental to the principal thing."[162] The legal definition of "accession" is more strict, pertaining to a way of acquiring ownership by one person, with consequent loss of ownership by another, by reason of the identification of the property of the latter with property of the former.[163]

The tests employed to determine when goods affixed by their owner to his own land become so much identified with the land that they should be treated as part of it are not necessarily appropriate for determining when the owner of chattels loses his ownership to another by reason of their affixation to the land of the other person.[164]

The common law of accession is not well developed, but there are a few settled principles.[165] For example, when chattels become so incorporated into another's property that they have no separate existence, the owner of the chattels loses his right to reclaim them.[166] Another is that one's goods, even if identifiable, may not be taken if their recovery would involve a shocking loss or destruction of the property of another,[167] as by pulling down a building to recover nails used in its construction. Beyond that, much depends on the relation between the owner of the things attached and the owner of the property to which they have been annexed. Legal discussions are usually in terms of the law of fixtures, and often they purport to apply the same intention test developed for (and generally suitable for) common-ownership cases. The results, however, may be affected by the divided-ownership feature.[168]

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[162] 5 Am. Law Prop., *supra* note 1, § 19.8, at 32.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 33.

[166] *See* Porter v. Pittsburg Bessemer Steel Co., 122 U.S. 267 (1887); Shoemaker, Miller & Co. v. Simpson, 16 Kan. 43 (1867); 5 Am. Law Prop., *supra* note 1, § 19.8, at 33.

[167] *See, e.g.*, Babiak v. Strum, 20 Ill. App. 2d 191, 155 N.E.2d 332 (1959); Crawford-Fayram Lumber Co. v. Mann, 203 Iowa 748, 752, 211 N.W. 225, 227 (1926); *cf.* Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N.W.2d 488 (1945).

[168] *See* 5 Am. Law Prop., *supra* note 1, § 19.8, at 33-34.

A. Trespassers

When one with no interest in land trespasses upon it and annexes goods to it, the maxim that what is affixed to the soil belongs to the soil is usually applied with a vengeance.[169] The intention test is generally ignored; a trespasser, knowing he is such, is not likely to intend to donate his goods to the owner of the freehold.[170] The reason for holding that title to the goods passes to the landowner is usually given as the "fraud or folly" of the trespasser.[171] Sometimes the theory used is based upon the need to protect the landowner's right to exclusive enjoyment and possession of his land.[172]

When the trespasser acts in bad faith, especially after he has lost possession, he is in a poor position to ask the courts to allow him to recover his annexations or their value. The courts usually classify his annexations as fixtures belonging to the owner of the land.[173] An exception has emerged in favor of railroad trespassers.[174] Another exception has developed favoring trespassers who make improvements on public land.[175]

Although it would seem that a trespasser who in good faith believed he was acting within his rights would deserve more consideration than a bad-faith trespasser, the courts have shown little tendency to consider the innocent state of mind of a trespasser.[176] When goods affixed to the land belong to an innocent third party, however, he will be permitted to remove them unless by doing so he will damage the premises.[177]

Case law appears undesirably inflexible and leads to many hard decisions. It would seem that if annexations are removable without damage to the premises, a trespasser who acted in good faith should be allowed to remove them. In many states, legislation has been enacted

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[169] *E.g.*, The Inhabitants of the First Parish v. Jones, 62 Mass. (8 Cush.) 184 (1851); Washburn v. Sproat, 16 Mass. 371, 16 Tyng 449 (1820); Henderson v. Ownby, 156 Tex. 647 (1882). *But see* Heiselt Constr. Co. v. Morrison-Knudson Co., 176 F.2d 207 (10th Cir. 1949).

[170] *See* Crest v. Jack, 3 W. & S. 238 (Pa. 1834); 5 Am. Law Prop., *supra* note 1, § 19.9, at 34-35.

[171] 5 Am. Law Prop., *supra* note 1, § 19.9, at 35 n.3.

[172] *Id.*

[173] *Id.* at 35.

[174] *See, e.g.*, Thompson v. Pollack, 322 Ill. App. 73, 53 N.E.2d 737 (1944); Texas & N.O. Ry. v. Schoenfeld, 136 Tex. 173, 146 S.W.2d 724 (1941). *Contra*, Meriam v. Brown, 128 Mass. 391 (1880).

[175] *E.g.*, Seymour v. Watson, 5 Blackf. 555 (Ind. 1841); Brandser v. Mjageto, 79 Minn. 457, 82 N.W. 860 (1900). *But see* Marcy v. Darling, 25 Mass. 291, 8 Pick. 283 (1829).

[176] *See, e.g.*, Hereford v. Pusch, 8 Ariz. 76, 68 P. 547 (1902); Titus v. Poland Coal Co., 263 Pa. 24, 106 A. 90 (1919).

[177] *E.g.*, Shoemaker v. Simpson, 16 Kan. 43 (1876); Eisenhauer v. Quinn, 36 Mont. 368, 93 P. 38 (1907).

in favor of good-faith trespassers,[178] but the statutes generally are limited to giving the trespasser a right to the value of his improvements when an action is brought against him for recovery of possession of the land.[179] They do not usually give the trespasser an *affirmative* remedy to recover his improvements or their value.[180]

The earliest reported Mississippi fixtures case, *Stillman v. Hamer*,[181] was a trespasser case. Hamer and Caldwell were joint owners of a number of lots. Caldwell conveyed his undivided interests to Richards. Richards died, and his heirs went into chancery court seeking partition of the lots owned jointly with Hamer. A division was made, and a court-appointed commissioner conveyed the lots. Lot number 77 fell to Richards' heirs under the division, but the commissioner's deed covering it was lost and never recorded. Apparently without any new authorization from the court, the commissioner executed a new deed to Richards' heirs some 4 years after the original conveyance, and this deed was recorded. Between the times of the two conveyances, Hamer sold lot 77 to Garr, who erected a house on the lot. The house was a frame building resting on wooden blocks or pillars, with a brick chimney which rested on a foundation set several inches into the soil.

After Richards' heirs received their second deed, they brought a writ of forcible entry and detainer against Garr and won a favorable decision. Hamer, with Garr's consent, removed the house from lot 77, and Richards' heirs brought trover against Hamer to recover the value of the building. Plaintiffs appealed a verdict and judgment for defendant.

The High Court of Errors and Appeals ordered a new trial, on the ground that the law had not been correctly interpreted by the court below. The view of the court below has to be inferred from the high court's exposition of the correct law but appears to have been that a trespasser may remove structures erected by him in the mistaken belief that he was rightfully on the land and entitled to build upon it, provided he makes the removal while still in possession of the land and there is no damage to the land itself. The high court declared that if one erects buildings on the land of another without the owner's consent, they may not be removed; the buildings become fixtures and the property of the owner of the land.[182]

Yet having taken this firm stance as to the legal rule (one, inciden-

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[178] 5 AM. LAW PROP., *supra* note 1, § 19.9, at 36 n.11.

[179] *Id.* §§ 19.9-.12, at 36-37.

[180] *Id.*

[181] 8 Miss. (7 How.) 421 (1843).

[182] *Id.* at 422-24.

tally, in accord with the prevailing rule elsewhere),[183] the court observed that it would be for the chancery court

> to decide whether there [were] any equitable circumstances in this cause, either on the ground of mistake, want of notice on the part of Garr of the rights of the plaintiffs, or from other cause, which would justify its interposition.[184]

The court suggested also that on the retrial of the case it would be proper to consider whether the commissioner had authority to make the second conveyance without a new appointment by the court. These qualifications on the principal ruling, particularly the broad hint that equity might grant relief to a good faith trespasser acting under mistake, seem to remove much of the sting from the "true rule"[185] of the common law. *Stillman* is the most unfavorable Mississippi decision regarding a trespasser's right to remove his additions to land.[186]

In *Louisville, New Orleans & Texas R.R. v. Dickson*,[187] the railroad entered defendant's land and began construction of track without acquiring the right of way beforehand. After construction began the company instituted condemnation proceedings.

Commissioners, appointed to assess the defendant's damages, were instructed to include in their assessment "the value of the iron, roadbed, and bridges at their value in the market generally, but not as a railroad or as constituting any part of it."[188] This instruction was held to be erroneous; the defendant was not entitled to any award based on the value of the railroad's additions to the land. The court held that although the railroad was a trespasser,

> it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of due compensation. The continuing right of the company to secure the right of way, . . . and the nature of its entry on the land and annexing chattels to the soil distinguish the case from that of a trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, is not applicable. Answerability by the company for its trespass in the appropriate action, and "due compensation" in the proceedings for

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[183] See notes 169-72 & accompanying text *supra*.

[184] 8 Miss. (7 How.) at 424.

[185] See note 176 & accompanying text *supra*.

[186] In all other Mississippi trespass cases, the rulings favored the trespasser, although most of them fall within the generally recognized exceptional rule for railroad trespassers. *E.g.*, Illinois Cent. R.R. v. LeBlanc, 74 Miss. 650, 673-75, 21 So. 760, 762-63 (1897).

[187] 63 Miss. 380 (1885).

[188] *Id.* at 381 (statement of facts by Hon. L. McLaurin, Chancellor).

> condemnation of the right of way, constitute the full measure of the right of the landowner.[189]

In *Illinois Central R.R. v. LeBlanc*,[190] certain land, crossed by Illinois Central's tracks, was sold for unpaid taxes. The railroad brought suit to redeem the land and cancel the tax deed, but the court held for LeBlanc, who had good title to the land under the tax deed. LeBlanc then brought ejectment against the railroad. The railroad appealed from a judgment in LeBlanc's favor. Although the case involved numerous issues unrelated to the law of fixtures, one question considered on appeal was whether LeBlanc, having good title to the land, including the railroad right of way, also owned the tracks and other goods the railroad had placed on the land. In finding that he did not, the court cited the *Dickson* case, and cases from other jurisdictions, to the effect that "the general rule as to things affixed to the freehold by a trespasser or a person entering tortiously,"[191] does not apply as against an entity possessing the power of eminent domain who, entering under such power without leave, makes improvements for "the public purpose for which it was created and given such power."[192] The court concluded:

> The land in this case was neither assessed nor sold as railroad property, nor for taxes due from the railroad company, but was assessed and sold under the general statutes on the subject of assessment and sale of land for taxes. . . . [T]he title to the chattels put upon the land by the [railroad], and the structures under them, was not vested in [LeBlanc] either under the tax sale or the chancery decree, and was not included in his recovery in this case.[193]

In *Illinois Central R.R. v. Hoskins*,[194] Hoskins brought ejectment against the railroad which had, without his consent and without condemning a right of way, constructed a spur line across his land to reach needed gravel deposits. A judgment was rendered awarding plaintiff the land and $1500 damages. The $1500 figure represented an allowance to plaintiff of $1800 based on rental value less $300 as the value of the track. The decision as to damages was reversed on appeal. The court concluded that the plaintiff

> should not have recovered $1,800 for the use and occupation, because no part of that sum arose from any use of the land to which the defendant could have devoted it, nor should the defendant have been allowed

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[189] *Id.* at 385 (opinion by Campbell, J.).
[190] 74 Miss. 650, 21 So. 760 (1897).
[191] *Id.* at 673, 21 So. at 762.
[192] *Id.*
[193] *Id.* at 674-75, 21 So. at 763.
[194] 80 Miss. 730, 32 So. 150 (1902).

> [compensation] for the structures put by it up on the land, *which structures it is entitled to remove at its pleasure*. . . . The plaintiff shows a right to recover the premises from the defendant, and he is entitled to recover also of defendant, for its use and occupation, a reasonable compensation for any use to which it could reasonably have been put by the plaintiff, and a further sum to cover all damages done upon the land by the defendant in constructing a roadbed for its railway track.[195]

The opinion cites the *Dickson*[196] and *LeBlanc* cases[197] as well as cases from other jurisdictions and adds the interesting suggestion that the intention test could be used to justify finding that the goods did not become fixtures.[198] Because the railroad's power of eminent domain was a power to take only an easement—and not a freehold, the railroad could not be said to intend to attach its rails, ties, and other goods to the freehold.

In *Anderson-Tully Co. v. United States*,[199] the United States Court of Appeals for the Fifth Circuit held that when the United States government occupied land in Mississippi as a lessee, erected structures thereon, retained possession after the last lease expired, and instituted eminent domain proceedings under federal statutes to acquire ownership of the land, evidence of the market value of the structures was properly excluded on the question of the value of the land condemned. The court had multiple justifications for its ruling, stating that even if the government were treated as a trespasser, the holding in *LeBlanc* exempted it from the general rule regarding trespassers.[200]

The above cases involving railroads are in line with cases in other jurisdictions making an exception to the general rule applied to trespassers in favor of railroads.[201] Its application to governmental trespassers in *Anderson-Tully* is not surprising, as the underlying reason for the exception in favor of railroads is probably an assumption that the public interest is promoted, although at some expense to the landowner.

B. Licensees

When one with no interest in land gets the owner's permission to affix goods to it, even in the absence of express agreement, the licensee

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[195] *Id.* at 737-38, 740, 32 So. at 151-52 (emphasis added).

[196] *Id.* at 738, 32 So. at 151.

[197] *Id.* at 740, 32 So. at 152.

[198] *Id.* at 739, 32 So. at 151.

[199] 189 F.2d 192 (5th Cir.), *cert. denied*, 342 U.S. 826 (1951).

[200] 189 F.2d at 197, *quoting* Illinois Cent. R.R. v. LeBlanc, 74 Miss. 650, 673, 21 So. 760, 762 (1897). However, it is not clear that the court considered itself to be applying Mississippi law.

[201] See note 174 & accompanying text *supra*.

may, as against the licensor, remove his goods subject to an obligation to repair any injury to the premises caused by the removal.[202] There are no cases deciding whether, if full restoration is impossible, the licensee loses his ownership or merely becomes liable for damages.[203]

More difficult problems arise when the licensee has a right of removal against the licensor, but a third party acquires an interest in the land by purchasing the land from the licensor or taking a mortgage from the licensor, after the affixation has occurred. When the third party has notice of the separate rights of the licensee, his rights should be no greater than those of the licensor.[204] Since he has not been misled, there is no basis for applying estoppel. Moreover, the parol evidence rule is no obstacle to the licensee, since he has not been a party to the instrument by which the third party has acquired his interest.[205] In a case where the subsequent party is without notice, however, and the goods appear to have become a permanent part of the realty, both the licensee and the third party have claims worthy of consideration.[206] The third party, relying on appearances, could not protect himself by searching the records. Yet the licensee, under his agreement with the licensor, considers the goods his personal property and has neglected no statutory duty to record.

A few jurisdictions have approached the problem by determining whether the goods are real or personal property.[207] This is an insufficient technique, since the tests which would lead to the conclusion that the goods have become realty in cases of affixation by the owner[208] are not useful here because of the express or implied agreement between licensee and licensor. The prevailing and preferable view, in the opinion of the authors of the *American Law of Property*, is that short of true accession the licensee remains the owner of the goods unless he has affixed them in such a way as to make them appear part of the land. In those instances, the licensee is estopped to assert his ownership against third parties misled by the appearance.[209] Thus, the licensor has a power to

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[202] *E.g.*, Taylor v. Heydenreich, 92 Cal. App. 2d 684, 207 P.2d 599 (2d Dist. Ct. App. 1949); Forbes v. Forbes, 137 N.J. Eq. 520, 46 A.2d 62 (1946). *But see* Holicer Gas Co. v. Wilson, 45 So. 2d 96 (La. Ct. App. 1950).

[203] 5 AM. LAW PROP., *supra* note 1, § 19.10, at 37.

[204] *E.g.*, Readfield Tel. & Tel. Co. v. Cyr, 95 Md. 287, 49 A. 1047 (1901); Welter v. Capponi, 242 Wis. 625, 9 N.W.2d 115 (1943).

[205] 5 AM. LAW PROP., *supra* note 1, § 19.10, at 38.

[206] *Id.* at 38-39.

[207] *See, e.g.*, School Dist. No. 11 v. Donahue, 55 Wyo. 220, 97 P.2d 663 (1940); 5 AM. LAW PROP., *supra* note 1, § 19.10, at 38.

[208] *See* 5 AM. LAW PROP., *supra* note 1, § 19.10, at 38.

[209] *E.g.*, Muir v. Jones, 23 Ore. 332, 31 P. 646 (1892); Welter v. Capponi, 242 Wis. 625, 9 N.W.2d 115 (1943); 5 AM. LAW PROP., *supra* note 1, § 19.11, at 39.

cut off the licensee's ownership by a conveyance or encumbrance to a purchaser or mortgagor without notice.[210]

The earliest of the Mississippi fixtures cases, *Stillman v. Hamer*,[211] discussed above, accepted by dictum the "inherent good sense" of a rule allowing one who has built on the land of another by his parol license to remove the structure as against the licensor.[212]

The only Mississippi decision clearly involving the question of a licensee's rights in goods attached to land of a licensor is *Connolly v. McLeod*.[213] Its discussion is entirely concerned with the licensee's rights against the licensor, though there was a potential issue regarding the licensee's rights against a third-party claimant.[214] In *Connolly*, McLeod and Mrs. Connolly's son, Peter, had erected a restaurant on Mrs. Connolly's land with her knowledge but without express consent. The restaurant was operated for a short time and then closed. Mrs. Connolly later leased the restaurant to Biglane who operated it up to the time of the litigation. McLeod brought suit in equity against Peter Connolly, Mrs. Connolly, and Biglane, alleging that Peter had agreed to buy his interest. He sought judgment against Peter for the agreed purchase price, imposition of a lien upon the building and its contents to secure payment of the judgment and recovery against Biglane and Mrs. Connolly of the rentals paid by Biglane to Mrs. Connolly.

The chancellor found that the evidence did not establish a sale of McLeod's interest in the property to Peter and therefore ruled that he was not entitled to recover the sales price against him nor to a lien on the property.[215] The chancellor, however, did find that (1) Mrs. Connolly had assented to the erection of the building on her land, (2) the building remained personal property, and (3) McLeod owned an undivided half interest in it. He therefore ruled that McLeod was entitled to one-half of the rentals collected and to be collected from the property and entered a decree against Mrs. Connolly and Biglane for those rentals. Mrs. Connolly appealed.[216]

The supreme court affirmed, remanding for such further proceedings as might be necessary to enable McLeod and Mrs. Connolly to remove the building and its "fixtures" and equipment from Mrs. Connolly's land or make other suitable disposition of the property.[217] The chancellor was held not to have erred in finding that McLeod and Peter

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[210] 5 Am. Law Prop., *supra* note 1, § 19.10, at 39.
[211] 8 Miss. 421 (1843).
[212] *Id.* at 423.
[213] 212 Miss. 133, 52 So. 2d 473 (1951).
[214] *See id.* at 138, 52 So. 2d at 474-75.
[215] *Id.* at 139, 52 So. 2d at 475.
[216] *Id.* at 140, 52 So. 2d at 475.
[217] *Id.* at 144, 52 So. 2d at 477-78.

Connolly remained the owners of the building, employing reasoning similar to that summarized above as the prevailing American law,[218] citing *Waldauer v. Parks* for the rule that a tenant may remove trade fixtures.[219]

Although *Connolly* seems quite orthodox, as far as it goes, an interesting question not discussed in the opinion is whether Biglane should have been free of responsibility to McLeod for rents already paid to Mrs. Connolly.[220] If Biglane dealt with Mrs. Connolly believing she owned the building and without reason to know of McLeod's interest, it would seem, by analogy to the "prevailing and preferable rule" suggested by *American Law of Property*, that he should have been able to invoke estoppel against McLeod to protect himself from having to pay again those rents already paid.

C. *Tenants*

The law regarding goods affixed by a tenant to leased land is not as easy to summarize as that applicable to the classes previously considered. The English law of fixtures was developed chiefly in landlord and tenant cases.[221] Although American fixtures law purportedly cut loose from English precedents at an early date,[222] echoes of the peculiarities of English doctrine crop up in American cases even today.[223]

The English law originated with a maxim derived from Roman law—*quicquid plantatur solo, solo cedit*—whatever is affixed to the soil belongs to it, which was taken to state a rule of law, though a gross oversimplification of the Roman law.[224] The progress of the English law was to soften the harshness of the rule by exceptions, without critical examination of the law as a whole.[225] As a result, it became complex and technical, often producing unsatisfactory results.[226]

Heavy emphasis was placed on the kind of goods involved and the degree and type of physical attachment between the land and goods placed on it, without any distinction between "common ownership" and

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[218] See notes 47-54 & accompanying text *supra*.

[219] 141 Miss. 617, 106 So. 881 (1926). This case is discussed at note 282 *infra*.

[220] Biglane apparently did not appeal from the chancellor's decree, which may well account for the court's failure to consider his situation.

[221] Niles, *supra* note 4, at 564.

[222] Whiting v. Brastone, 21 Mass. 323, 4 Pick. 310 (1826); *see* Teaff v. Hewitt, 1 Ohio St. 511 (1853).

[223] *See* Prudential Ins. Co. v. Kaplan, 330 Pa. 33, 198 A. 68 (1938); *cf.* 5 AM. LAW PROP., *supra* note 1, § 19.11, at 44.

[224] *See* Niles, *supra* note 4, at 560-64.

[225] *Id.* at 564; see note 7 *supra*.

[226] *See* Niles, *supra* note 4, at 563-65.

"divided ownership."[227] In the earliest landlord-tenant cases,[228] the approach probably did no great harm, as English society was largely agricultural and a tenant's annexations were likely to be a sort that would not be removable even today.[229] The industrial development of the 17th and 18th centuries, however, produced such a change in the relative values of land and goods attached to it that the hardship of the strict rule could not be tolerated. The result was the development of the doctrine of "trade fixtures": When a tenant installed goods on land he occupied, which goods were intended for use in the trade in which he was engaged, even though they were firmly affixed to the land, he could remove them before the end of his term.[230] At first "trade" appeared to be broadly conceived as covering almost any enterprise, and the underlying justification for the "trade fixtures" doctrine was one of encouraging economic development.[231] But more conservative judges narrowed the concept of "trade" to merchandising and manufacturing, so as not to include, for example, structures erected on a farm by a tenant in aid of his farming operations.[232] Furthermore, the English theory came to be that even "trade fixtures" were realty while attached to the land, the tenant having a rather anomalous right before his term expired, to remove them, reconvert them into personalty, and again become the owner of them.[233]

In the United States, the English precedents and theory were at first followed.[234] Beginning in the mid-19th century, however, the "intention test" won gradual acceptance: The intention of the person making the annexation to the land, objectively appraised, should control the question whether goods remained personal property or became part of the real estate.[235] This test was first stated as applicable to all cases, "common ownership" and "divided ownership" alike.[236] To this day it

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[227] 5 Am. Law Prop., *supra* note 1, § 19.2, at 14; Niles, *supra* note 4, at 560.

[228] *See, e.g.*, Elwes v. Maw, 102 Eng. Rep. 510 (K.B. 1802); Niles, *supra* note 4, at 564.

[229] 5 Am. Law Prop., *supra* note 1, § 19.2, at 10-11; Niles, *supra* note 4, at 564.

[230] *See, e.g., In re* Hulse, [1905] 1 Ch. 406; Gibson v. Hammersmith & City Ry., 62 Eng. Rep. 748 (V. Ch. 1862); Lawton v. Salmon, 126 Eng. Rep. 151 (C.P. 1782); Lawton v. Lawton, 26 Eng. Rep. 811 (Ch. 1743); Poole's Case, 91 Eng. Rep. 320 (K.B. 1703).

[231] *See* Niles, *supra* note 4, at 565.

[232] *See* Penton v. Robart, 102 Eng. Rep. 302 (K.B. 1801); *cf.* Niles, *supra* note 4, at 567.

[233] *See, e.g., In re* Hulse, [1905] 1 Ch. 406; Gibson v. Hammersmith & City Ry., 62 Eng. Rep. 748 (V. Ch. 1862); Mackintosh v. Trotter, 150 Eng. Rep. 1108 (Ex. 1838).

[234] *See, e.g.*, Swift v. Thompson, 9 Conn. 63 (1831); Gale v. Ward, 14 Mass. 352 (1817); Farrar v. Chauffetete, 17 N.Y. 867, 5 Denio 522 (1848); Cresson v. Stout, 6 N.Y. 306, 17 Johns. 116 (1819); Sturgis v. Warren, 11 Vt. 433 (1839).

[235] Teaff v. Hewitt, 1 Ohio St. 511 (1853).

[236] *Id. See generally* Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L.Q. Rev. 66 (1935).

is often so discussed, though the results in individual cases often do recognize distinctions.[237]

Insofar as a tenant's affixations to leased land are concerned, the "trade fixtures" doctrine has been broadened in the United States to the point of virtual meaninglessness. The widely held view is that a tenant's affixations to the land, regardless of the mode and degree of physical attachment and without serious concern about the functional relation of the goods to the tenant's "trade," are to be regarded as intended by him to be temporary attachments.[238] Such affixations remain his property and are removable by him, unless a permanent accession to the realty affirmatively appears to have been intended or unless the goods are so affixed to the land as to lose their separate identity or not to be removable without causing shocking damage to the realty.[239]

Nevertheless, the cases are replete with references to "trade fixtures,"[240] or similar "exceptions" to the general rule for "domestic fixtures,"[241] "ornamental fixtures,"[242] and "agricultural fixtures."[243] Furthermore, the rule persists that a tenant must remove his fixtures before the end of the term (or, in cases of indefinite tenancies, within a reasonable time after termination of the tenancy) or cede all rights to the landlord.[244] This rule has sometimes been carried to the point of holding that a tenant loses his right to remove fixtures installed during his term if he renews his lease without expressly reserving his right of removal, even though there is no interval between the terms when the tenant is out of possession.[245] To the extent that the rule has any modern justification, it is one of protecting the landlord's right to undisturbed possession of

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[237] *See generally* 3 S.C.L.Q. 178 (1950); 33 TEXAS L. REV. 251 (1955).

[238] *See* Teaff v. Hewitt, 1 Ohio St. 511 (1853); *cf. In re* Mount Holly Paper Co., 110 F.2d 220 (3d Cir. 1940); Southern Cal. Tel. Co. v. State Bd. of Equalization, 12 Cal. 2d 127, 82 P.2d 422 (1938); Morey v. Hoyt, 62 Conn. 542, 26 A. 127 (1893); Bartlett v. Haviland, 92 Mich. 552, 52 N.W. 1008 (1892); Kile v. Giebner, 114 Pa. 381, 7 A. 154 (1886).

[239] *See, e.g.*, Dudzick v. Lewis, 175 Tenn. 246, 133 S.W.2d 496 (1939); Eckstine v. Webb Walker Jewelry Co., 178 S.W.2d 532 (Tex. Civ. App. 1944); 5 AM. LAW PROP., *supra* note 1, § 19.11, at 43.

[240] *E.g.*, Midwest Fuel & Timber Co. v. West, 106 F.2d 973 (10th Cir. 1939); People v. Church, 57 Cal. App. 2d 1032, 136 P.2d 139 (Super. Ct. 1943); Bank of Shelbyville v. Hartford, 268 Ky. 135, 104 S.W.2d 217 (1937).

[241] *E.g.*, *In re* Shelar, 21 F.2d 136 (W.D. Pa. 1927); De Charrette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S.W. 1054 (1927).

[242] *E.g.*, De Charrette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S.W. 1054 (1927); Freeman v. Truax, 103 W. Va. 132, 136 S.E. 697 (1927).

[243] *E.g.*, *In re* Shelar, 21 F.2d 136 (W.D. Pa. 1927); Klocke v. Troske, 57 N.D. 404, 222 N.W. 262 (1928).

[244] *E.g.*, Pioneer Mill Co. v. Ward, 34 Hawaii 686 (1938); Henderson v. Robbins, 126 Me. 284, 138 A. 68 (1927).

[245] *See, e.g.*, Sanitary Dist. v. Cook, 169 Ill. 184, 48 N.E. 461 (1897); Merrill v. Garver, 54 Ind. App. 514, 101 N.E. 152 (1913).

the premises after he has resumed possession, but this could be achieved with a less drastic rule.

Another disturbing factor in American law has been the question whether a tenant's "fixtures" become the landlord's property as realty unless and until the tenant exercises his extraordinary right to remove them and thereby regain ownership of them as personalty, or whether they remain personal property, owned by the tenant with the right of removal, but subject to loss to the landlord if not timely removed.[246] The basic question is one of ownership, and the prevailing American view is that the property is the tenant's in the absence of true accession or clearly shown intent to transfer ownership.[247] As to whether the property is real or personal, there is no reason why the tenant's property cannot occupy an intermediate status and be treated as real property for some purposes and personal property for others. For example, it might be ruled that the statute of frauds covering contracts for the sale of interests in land does not apply when the tenant undertakes to sell the goods apart from the land, but that compensation should be awarded the tenant for the value of his "fixtures" when leased premises are taken in condemnation. The prevailing American view, however, is that the tenant's "fixtures" are personal property for all purposes.[248]

When the rights of third parties become involved, as in the licensee cases, different considerations come into play. When the lessee is the tenant of a life tenant, for example, regardless of agreements between landlord and tenant, the sublessee should not be permitted to remove affixations where substantial damage to the freehold would result, for the life tenant does not have power to authorize actions that would damage the reversion.[249] Similarly, if land is subject to a mortgage when leased by the owner, the tenant cannot be given the right to remove fixtures if removal would cause damage impairing the value of the mortgagee's security.[250] When purchasers or mortgagees of the land acquire their interests after the tenant has affixed goods to the land in such a way as to make them appear to be permanent additions, the question will usually turn on whether the third person had notice of the tenant's rights.[251] Cases of third parties without notice are rare, however, because

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[246] *See* 5 AM. LAW PROP., *supra* note 1, § 19.11, at 39-46.

[247] *See, e.g.*, United States v. Mallery, 53 F. Supp. 564 (W.D. Wash. 1944); Bank of Shelbyville v. Hartford, 268 Ky. 135, 104 S.W.2d 217 (1937); Whitney v. Hahn, 18 Wash. 2d 198, 138 P.2d 669 (1943).

[248] See cases cited in note 247 *supra*; 5 AM. LAW PROP., *supra* note 1, § 19.11, at 44-45.

[249] 5 AM. LAW PROP., *supra* note 1, § 19.11, at 45.

[250] *E.g.*, McClure v. Atlantic Rock Co., 339 Pa. 296, 14 A.2d 124 (1940); *see* 5 AM. LAW PROP., *supra* note 1, § 19.11, at 45.

[251] 5 AM. LAW PROP., *supra* note 1, § 19.11, at 46.

the tenant's possession of the land is ordinarily sufficient to put the prospective purchaser or mortgagee on inquiry as to the tenant's rights.[252]

The earliest discussions of fixtures law in Mississippi employed the same doctrine as the English cases: Whatever is affixed to the land becomes part of the land. Decisions usually described in detail the way the goods were affixed to the land, as if that were the critical factor in classifying them as realty or personalty. By the time these cases were decided, however, the "general rule" had already become riddled with "exceptions," at least in other American jurisdictions. And the Mississippi Supreme Court not only accepted that pattern of case law but nearly despaired of making sense of it in terms of overall principle. *Stillman v. Hamer*[253] is the leading example of this approach. The most common generalization was that the "rule" applied most strictly as between heir and executor, vendor and vendee, and mortgagor and mortgagee, while the greatest relaxation of the "rule" was in favor of tenant against landlord.[254] Beyond that, about all that can be said was that much depended on the facts of each case.

By 1868, the Mississippi Supreme Court was shifting to emphasizing the intention of the person making the affixation of the goods to the land to determine whether or not they had become fixtures.[255] The nature of the goods and the manner of their attachment to the land were circumstantial evidence, sometimes controlling, of the intention of the party making the annexation, but also to be considered were the position of the annexing party and the functional relation between the goods and the uses to which the land was devoted, as well as the provisions of any express or implied agreements.[256]

The term "fixtures" in Mississippi decisions has usually been used to refer to goods which have become so associated with land as to become converted from personal property to real property.[257] If goods are attached to land by someone other than the landowner, and if they are found to have become fixtures, transfer of ownership to the landowner

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[252] *Id.*

[253] 8 Miss. 421 (1843). *See also* English v. Foote, 16 Miss. 444 (1847); Terry v. Robins, 13 Miss. 291 (1845).

[254] Weathersby v. Sleeper, 42 Miss. 732, 741 (1869). *See also* Richardson v. Borden, 42 Miss. 71, 72 (1868).

[255] *See, e.g.*, Richardson v. Borden, 42 Miss. 71 (1868).

[256] Richardson v. Borden, 42 Miss. 71 (1868), is illustrative of this change in emphasis, a change which emerges even more clearly in Weathersby v. Sleeper, 42 Miss. 732 (1869).

[257] *See* Perkins, Livingston & Post v. Swank, 43 Miss. 349 (1870); Weathersby v. Sleeper, 42 Miss. 732 (1869); Richardson v. Borden, 42 Miss. 71 (1868); English v. Foote, 16 Miss. 444 (1847); Stillman v. Hamer, 8 Miss. (7 How.) 421 (1843).

is assumed to follow.[258] An apparent contradiction in terminology develops when a *tenant* affixes goods to the land. Such goods, often referred to as the tenant's "fixtures" or "trade fixtures," may be held not to be "fixtures."[259] It is evident that the term "fixtures" is being used in two different senses here. "Tenant's fixtures" or "trade fixtures" are goods affixed to land by a tenant in such circumstances that they would, or at least might, be treated as having become real property if the affixation had been made by the owner. A holding that such goods are not "fixtures" is a holding that the goods remain personal property and the property of the tenant. Mississippi decisions follow the prevailing American view that "trade fixtures" remain personal property and belong to the tenant, subject to being lost to the landlord if not removed by the tenant before or at the end of his term.[260]

The earliest Mississippi case involving tenants' affixations to land is *Weathersby v. Sleeper*.[261] It is an unusual case in that no one involved in the litigation appears to have been asserting a claim to the goods as real property, the question being whether replevin would lie for their recovery.[262] The case was disposed of by resort to the law of fixtures. The decision was that replevin would lie because the goods had not become fixtures, but remained chattels. Factors leading to the no-fixtures categorization were: (1) the means of attachment of the goods to the realty admitted of their removal "without injury to any property, or even inconvenience";[263] (2) an intent not to make the goods permanent accessions to the freehold was clear from the manner of annexation, the use to which they were put, the history of removal of the goods from place to place, and their "liability to be taken away or disposed of";[264] and (3) the many (non-Mississippi) precedents for the proposition that "a building or other fixture, which is ordinarily a part of the realty, is personal property when placed on the land of another by contract or by consent of the owner."[265]

Nearly 30 years elapsed before the next decision involving tenants' "fixtures." *Polle v. Rouse*[266] arose from these facts: In 1892, Ruttenberg executed a land deed of trust to Equitable Mortgage Company, securing payment of notes. The recorded deed of trust stipulated it was to cover,

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[258] Perkins, Livingston & Post v. Swank, 43 Miss. 349 (1870); Weathersby v. Sleeper, 42 Miss. 732 (1869); Stillman v. Hamer, 8 Miss. (7 How.) 421 (1843).

[259] *See, e.g.*, Weathersby v. Sleeper, 42 Miss. 732 (1869).

[260] Tate v. Blackburne, 48 Miss. 1 (1873) (dictum).

[261] 42 Miss. 732 (1869). See note 55 & accompanying text *supra*.

[262] *Id.* at 738.

[263] *Id.* at 741.

[264] *Id.* at 743.

[265] *Id.*

[266] 73 Miss. 713, 19 So. 481 (1896).

in addition to the land, "all machinery now upon, or which may be hereafter put upon said premises, whether attached or detached."[267] Ruttenberg died and his heirs leased the land to Kuhn. Kuhn was to apply the rentals to the discharge of Ruttenberg's debts, including the debt secured by Equitable's deed of trust. During the following year Kuhn bought a boiler, engine, and other equipment on credit from Rouse and installed it on the rented land. Rouse was to retain title to the goods until the purchase money was paid. In 1895, Holloway, claiming to be the duly appointed substitute trustee under Equitable's deed of trust, advertised the lands and offered them for sale. Kuhn's attorney appeared at the sale and offered to pay the mortgage debt, provided Holloway would give him Ruttenberg's notes. Holloway did not have the notes with him, and Kuhn's attorney refused to pay. Although Kuhn's attorney informed those present he would contest the sale's validity, Holloway sold and conveyed the land to Armistead, who put Polle in possession of the property as his agent. Rouse brought replevin against Polle to recover the machinery and had judgment.

On appeal, Polle conceded that Rouse had a right to the machinery as against Kuhn but argued the right was not good against him because (1) the machinery had been so attached to the land as to become a fixture in favor of the holder of the notes secured by the deed of trust (whose interest passed to Armistead, Polle's principal, by force of the trustee's sale and deed), and (2) regardless of this, Armistead was a bona fide purchaser of the land at the trustee's sale, and as to him, the machinery on the land was a fixture.[268]

The supreme court found no merit in either contention. The machinery was not subject to the deed of trust, the court reasoned, because Ruttenberg could grant an interest through the deed of trust only in his own property. The machinery was not Ruttenberg's (or presumably, that of his heirs) because it was affixed by a tenant. The law, to protect tenants, holds that many articles, which if affixed by others would be considered fixtures, remain chattels.[269] If Kuhn had been a tenant of Ruttenberg's and had already affixed the machinery to the land at the time Ruttenberg executed his deed of trust, Ruttenberg could not have bound the goods because he personally could not have taken them. The rule is that one buying from a landlord or accepting an encumbrance must take notice of the legal rights of a tenant in possession of the land.[270] A fortiori, the opinion seems to imply, Ruttenberg could not

[267] *Id.* at 716, 19 So. at 481.
[268] *Id.* at 717, 19 So. at 482.
[269] *Id.*
[270] *Id.*

encumber goods later affixed to the land by a tenant put into possession after the execution of the deed of trust.[271]

The court brushed aside the argument that Armistead, as a bona fide purchaser at the foreclosure sale, acquired a greater right than Equitable on the basis that the record failed to show Holloway had been duly appointed substitute trustee under the deed of trust and hence failed to show Armistead had purchased the property at all.[272] Armistead acquired nothing by his deed from Holloway except an equitable right of substitution to the debt discharged by his payment.[273]

The decision, on the question whether a tenant's attachments to leased land become subject to a previously executed deed of trust given by the landowner to a third person, seems sound. The landowner could not have had any rights on the goods to encumber at the time the deed of trust was executed, nor could the mortgagee have been misled by the tenant into thinking such goods were subject to the encumbrance. Assuming, as the court did, that where the tenant later affixes goods to the land, the landlord does not acquire an interest in them, then no interest in the goods could pass to the mortgagee through the mortgagor. Assuming also that the mortgagee makes no additional advances and takes no other action in reliance on the appearance that the goods have become part of the land, there is no basis for estoppel against the tenant. If the tenant's interest in the goods is free of the encumbrance, there is no reason why the seller of the goods, reserving a purchase money security interest, should be any more vulnerable to the claim of the mortgagee or one claiming through the mortgagee.

An odd feature of the court's reasoning is that it reached its conclusion by drawing an analogy to the case where a landowner executes a deed of trust on land which is already in the possession of a tenant who has affixed goods to it, with the possibility of the mortgagee being detrimentally misled by appearances. In such a situation it apparently becomes necessary to rule that one accepting an encumbrance on land in the possession of a tenant takes with notice of the tenant's rights against the landlord.

McMath v. M. Levy & Sons[274] was decided the same year as *Weathersby*. The statement of fact is highly abbreviated, but it appears that McMath was the lessor of a plantation upon which there was a cotton gin. The gin was subsequently lost or damaged and was no longer

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[271] *Id.* at 718, 19 So. at 482.

[272] *Id.*

[273] *Id.* at 719, 19 So. at 482.

[274] 74 Miss. 450, 21 So. 9 (1896), *aff'd on suggestion of error*, 74 Miss. 452, 21 So. 523 (1897).

usable on the plantation.[275] After McMath refused to replace the machinery, the tenant purchased the necessary equipment and installed it on the land, intending to remove it later. Subsequently the tenant sold the ginning machinery to M. Levy & Sons. When the latter sought to remove its purchase from the plantation prior to the end of the term of the tenant's lease, McMath, who had retaken possession of the premises, refused to allow the goods to be removed. Levy brought replevin against McMath and obtained judgment on a directed verdict.

Affirming the case, the court viewed the problem as simple:

> Against the general doctrine of fixtures made by one upon the premises of another there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. . . . The tenant not only put the machinery in question upon the leased premises during his term, but he did so with the intention to remove it; and his action was not only known to the landlord, but was necessitated by the refusal of the landlord to furnish for his tenant's use the indispensable gin and its accompaniments. The removal of the gin, etc., was sought to be made by the purchaser during the period of the lease, and before the tenant can fairly be said to have surrendered the premises.[276]

On suggestion of error,[277] the court added that had the tenant carried off the original ginning equipment or negligently permitted it to be lost or destroyed, the plaintiff's rights to the replacement machinery installed by the tenant and bought from him by the plaintiff would not be affected.[278] The landlord would have to look to the tenant for compensation for his wrong.

Except for indicating that the tenant's right of removal of his "fixtures" would not differ even if they were replacements of goods of the landlord which had been negligently or intentionally lost or destroyed by the tenant,[279] the case seems quite simple. The landlord had no reason to suppose the tenant meant to make the goods permanent additions to the freehold. Apparently it was assumed that the goods were not so affixed as to lose their identity and that they could be removed without serious damage to the freehold. In line with the uniform current of American authority, it was held that the tenant had the right to remove the goods before the expiration of his term, as against the landlord.[280] A vendee of the tenant is, not surprisingly, treated as having the

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[275] 74 Miss. at 453, 21 So. at 523 (on suggestion of error). The loss or damage may have been due to the fault of the tenant.

[276] *Id.* at 451-52, 21 So. at 9-10.

[277] *Id.* at 452, 21 So. at 523 (on suggestion of error).

[278] *Id.* at 453, 21 So. at 523 (on suggestion of error).

[279] *Id.*

[280] *See* 5 AM. LAW PROP., *supra* note 1, § 19.11, at 39-46.

same right.[281]

The subsequent case of *Waldauer v. Parks*[282] took a giant step backward in its reasoning, though there can be no quarrel with the result. With the consent of the lessor, the assignees of a 5-year lease of a plantation cleared and cultivated a large portion which had not been under cultivation at the time the lease was executed. They erected stables, barns, fences, and other improvements necessary for working the newly cleared land.[283] As the end of the lease term approached, the assignees began removing their improvements. The lessor's widow, who had inherited the plantation, brought a suit to enjoin the removals.[284]

There was conflicting testimony as to the defendants' purpose in erecting the structures but not as to the necessity of the structures to the profitable cultivation of the land. The conflict in regard to whether the structures were erected with a view to their becoming permanent additions to the land was resolved in favor of the defendants.[285]

In affirming, the supreme court held that the evidence justified a finding in favor of defendants as to their intention in attaching the improvements to the land.[286] The plaintiff was wrong in contending that the buildings in question were of such character as to become permanent parts of the freehold.[287] Citing *Van Ness v. Pacard*,[288] the court held that when a tenant erects a dwelling house on leased land, its removability does not depend on its form, size, or kind of foundation, but upon a finding that it was designed for the tenant's purposes alone. If the residence was merely an accessory for the beneficial exercise of the tenant's business, it did not become part of the freehold and was removable by him.[289]

It has been noted (1) that the "trade fixtures" concept developed in England as a device for avoiding the harshness of the old maxim that what is affixed to the land belongs to the land; (2) that in England the rights of tenants to remove their affixations became fairly strictly limited to "trade fixtures", narrowly defined; but (3) that with the general adoption of the "intention" test in the United States the "trade fixtures" concept came to be broadened to the point of virtual disappearance. Mississippi certainly seemed to be moving in this direction much

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[281] Winner v. Williams, 82 Miss. 669, 35 So. 308 (1903), similar in its facts and result to *Polle v. Rouse*, was controlled by *McMath*.

[282] 141 Miss. 617, 106 So. 881 (1926).

[283] *Id.* at 624, 106 So. at 882.

[284] *Id.* at 623-24, 106 So. at 881-82.

[285] *Id.* at 625, 106 So. at 882.

[286] *Id.*

[287] *Id.* at 626, 106 So. at 882.

[288] 27 U.S. (2 Pet.) 137 (1829).

[289] 141 Miss. at 626, 106 So. at 882.

earlier than 1926, as the cases reviewed above have illustrated. To find the *Waldauer* court, emphasizing the "trade fixtures" test of removability of tenants' "fixtures", even in so broadened a form as to include "agricultural fixtures", is disturbing. Doubtless, there could be circumstances in which it would be reasonable to infer that a tenant's attachments to land were intended by him to be permanent additions to it, even though they retained their separate identity and could be removed without great injury to the land. Yet the better view would appear to be that a finding that the tenant intended to donate his property to the landowner should be made only on the basis of affirmative evidence. As early as *Weathersby v. Sleeper*,[290] a case clearly involving affixations by a tenant, we find the Mississippi Supreme Court saying that

> inasmuch as it requires a positive act on the part of the person making the annexation to change the nature and legal qualities of a chattel into those of a fixture, the intention to make the article a permanent accession to the realty must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel.[291]

The emphasis in *Waldauer* on the "trade fixtures" concept did no harm, for the decision was in favor of the tenant. The possibly pernicious effect of this emphasis is suggested, however, by the fairly recent decision in *Smith v. Young*.[292] Smith held a 99-year lease on 16th section land which was to expire in 1945. In 1942, Smith assigned the lease to Roots, who executed a purchase money deed of trust in Smith's favor. In 1944, the authorities in charge of leasing those lands asked Roots if he desired to renew his lease and he declined. In 1945, the authorities executed a lease of the land to Young, his term to begin at the termination of Roots'. Eight days later Roots reconveyed the assigned lease to Smith in lieu of foreclosure of Smith's deed of trust. Smith, learning of Young's successor lease, brought suit to set aside the lease to Young and compel grant of a renewal lease to himself. In the alternative, he prayed for recovery of the value of the improvements he had made on the property.[293] The supreme court found that Smith was entitled to no priority over Young to a lease after expiration of his original lease.[294] The court also denied the prayer for the value of the improvements. The court read *Waldauer v. Parks* as establishing the rule

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[290] 42 Miss. 732 (1869).

[291] *Id.* at 742.

[292] 199 Miss. 658, 24 So. 2d 746 (1946).

[293] *Id.* at 665, 24 So. 2d at 747.

[294] *Id.* at 664, 24 So. 2d at 747.

> that one who erects improvements upon the lands of another, absent estoppel or other equitable rights, has no right to remove them. The exception noted with reference to the conventional relation of landlord and tenant goes no further than a recognition of the right of a tenant before expiration of his lease to remove structures designed for the purposes of trade and for the tenant alone. Neither of these elements is here present.[295]

That the decision on its facts may be a sound one is conceded, although the report gives no detail as to the nature of the improvements or the circumstances under which they were made. It is possible that the residence mentioned in the opinion was constructed early in the lease period and was of such construction that it could not be expected to remain useful beyond the term of the lease, in which case an intention to make it a permanent addition to the land might reasonably be inferred. It is also possible that the tenant who erected the improvements expected to be able to renew the lease beyond the original term and intended to do so. This would support an inference that he intended the house to be a permanent part of the premises. But the opinion, making no reference to any such facts, based its conclusion on the bare proposition that the improvements were not "for purposes of trade and for the tenant alone."[296] It appears, therefore, that the "trade fixtures" doctrine, as the sole exception to the general "rule" that what is attached to the land belongs to the land, is still very much alive in Mississippi.

One of the most interesting Mississippi cases involving tenants' "fixtures" because it broke new ground is *Frederick v. Smith*.[297] Smith took a lease on a farm in 1916 on which he installed an electric lighting plant to light the dwelling. The plant, except for its batteries, was placed in a small house some distance from the dwelling and was bolted to a concrete block on the ground. He also purchased a bath tub which was installed in the dwelling and attached to its piping system. In 1918, Smith bought the farm. In 1920, he and his wife executed a deed of trust on the land in favor of an insurance company to secure an indebtedness to that company. That same year Smith purchased and installed in the dwelling house a kitchen sink, attaching it to the walls and piping of the building. In 1924, the deed of trust was foreclosed and the property purchased by the mortgagee. However, Smith and his wife continued in possession of the premises as tenants of the insurance company and while occupying this position added to the premises a water tank, pump,

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[295] *Id.* at 664-65, 24 So. 2d at 747, *citing* Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926).

[296] 199 Miss. at 664-65,24 So. 2d at 747, *citing* Waldauer v. Parks, 141 Miss. 617, 106 So. 881 (1926).

[297] 147 Miss. 437, 111 So. 847 (1927). See note 135 & accompanying text *supra*.

and engine, as well as some underground piping. The tank, pump, and engine were replacements of similar equipment purchased and installed by Smith when he owned the farm. This equipment was used to supply water to the dwelling and other locations for the use of Smith and his family, watering of the livestock, and other farming operations.[298] In 1925, the insurance company sold the farm to Frederick. Smith shortly afterward moved off the farm, taking with him the lighting plant and bath tub installed during his first tenancy, the kitchen sink installed while he owned the farm, and the water tank, pump, engine, and piping installed during his second tenancy. Frederick brought replevin to recover these items and appealed a circuit court decision in Smith's favor.

The supreme court partially reversed and partially affirmed. After quoting the general tests for fixtures set forth in *Richardson* and *Weathersby*, as well as the passage of the *Richardson* opinion noting that "the rule" as to fixtures is applied with greater strictness against vendors and mortgagors than against tenants,[299] the court sorted out and dealt with the various items in the suit as follows:

(1) The lighting plant and bath tub, though purchased and installed while Smith was a tenant, became subject to the rule applicable to mortgagor-mortgagee cases, when Smith purchased the premises in 1918 and subsequently executed a mortgage on the land to the insurance company.[300]

(2) The kitchen sink, purchased and installed while Smith owned the land, was subject to the rule applicable to mortgagor-mortgagee cases, without apparent concern whether the installation occurred before or after the execution of the deed of trust.[301]

(3) As to all of the above items, the plaintiff was entitled to possession, and the court below should have preemptorily instructed the jury to so find.[302]

(4) As to the water tank, pump, engine, and piping installed in 1924, when he was again a tenant, the lower court was correct in preemptorily instructing the jury to find for defendants under the rule favoring the tenant's right to remove his attachments before the termination of his lease. The court held that the Smiths were under no obligation to the landlord to replace the equipment which had been destroyed without negligence or fault on their part.[303] The court noted that

> These articles having been purchased and placed on the leased prem-

[298] The tank was placed on a 16-foot tower near the barn, connected by pipe to the pump. *Id.* at 442-43, 111 So. at 847-48.

[299] 147 Miss. at 444, 111 So. at 848.

[300] *Id.* at 444-45, 111 So. at 848.

[301] *Id.*

[302] *Id.* at 445, 111 So. at 848.

[303] *Id.* at 445, 111 So. at 848-49.

> ises by the tenant for his own and [*sic*] convenience, we think, under the liberal rule in favor of a tenant, they did not become fixtures, and that he had the right to remove the same upon the termination of his tenancy.[304]

Regarding the tank, pump, and engine, appellant attempted to invoke the doctrine that machinery or trade fixtures placed on leased premises in substitution for essential parts, rather than as additions, were not removable but presumed to be permanent affixations. Conceding that the doctrine had ample support in other states, the court thought it not applicable to the present case because the tenant here was not substituting articles for similar articles already in use but rather was replacing destroyed articles which he was not obligated to replace.[305] Hence, they should be treated as additions.

The new ground broken in the case is the holding that goods affixed to the land by a tenant are to be treated as having become fixtures if he subsequently acquires ownership of the land (assuming, presumably, that the circumstances would have justified their having been treated as fixtures at the time of their affixation if the tenant had then been the owner). In terms of what a mortgagee, taking a mortgage on the land after the tenant has become the owner, could reasonably expect to be subject to the mortgage, the rule makes eminent sense. This approach is, however, inconsistent with the usual focus on the *time of attachment* of the goods to the land as controlling the determination of their status as fixtures in deciding what comes within the scope of a mortgage on the land.

We again have brought to our attention the lesson that no simple test of "fixtures" can solve all cases. What must be considered is why there is need for any determination at all, and further, what policies are relevant to the particular dispute involved.

Recognition of the probable validity in Mississippi of the proposition that if a tenant replaces goods of the landlord which can still be used or which he is under obligation to replace, the replacements become the landlord's property casts doubt, however, on the continued viability of the apparent holding in *McMath v. M. Levy & Sons*.[306]

Anderson-Tully Co. v. United States,[307] involving Mississippi land although not clearly governed by Mississippi law, was decided by rea-

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[304] *Id.* at 445-46, 111 So. at 849.

[305] *Id.* at 446, 111 So. at 849.

[306] 74 Miss. 450, 21 So. 9 (1896), *aff'd on suggestion of error*, 74 Miss. 452, 21 So. 523 (1897). See the discussion of *McMath* at text accompanying notes 274-81 *supra*; *cf.* Galbreath v. Taylor, 147 Miss. 556, 113 So. 180 (1927).

[307] 189 F.2d 192 (5th Cir.), *cert. denied*, 342 U.S. 826 (1951).

soning which is at least not inconsistent with Mississippi precedents. From 1924 through 1945, the United States Government occupied property fronting on the Mississippi River under various leases and extensions from Anderson-Tully Company [Anderson-Tully]. At least two of the leases, dated July 1937 and July 1941, provided that the United States should have the right to attach fixtures and erect structures which would remain the property of the government and might be removed by the government prior to the termination of the lease.[308] During the tenancy the government erected various structures related to oil storage. When the last lease expired, Anderson-Tully refused to renew it. The government retained possession of the premises, however, and instituted federal condemnation proceedings to acquire ownership of the land.[309] Anderson-Tully was awarded the value of the land condemned and appealed, contending that the trial court erred in excluding evidence of the market value of the fixtures and structures the government had added to the land.

The United States Court of Appeals for the Fifth Circuit affirmed. After invoking the familiar "trade fixtures" test exemplified by *Van Ness v. Pacard*,[310] the court found the traditional indulgence of tenants' claims to things attached to the land during the leasehold to be particularly true in cases involving governmental bodies exercising the right of eminent domain.[311] Recognizing the almost universal acceptance in the United States of the "intention" test for fixtures,[312] the court pointed to the fact that the government in at least two of the leases had expressly reserved title to improvements placed on the land. The court concluded that there could be no presumption that the government intended to confer ownership of public property on Anderson-Tully.

Anderson-Tully argued that even if the improvements were government property until the expiration of the 1937 lease, they became Anderson-Tully's when that lease expired in 1941 and a new one was executed.[313] To this the court had two answers: (1) The record failed to show that the improvements in question had been made during the term of the 1937 lease;[314] and (2) even if they had been, the fact that the government had not expressly provided in the renewal lease that attachments made during its prior lease should remain its property would not

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[308] 189 F.2d at 194-95.

[309] *Id.* at 195.

[310] 27 U.S. (2 Pet.) 137 (1829).

[311] 189 F.2d at 196.

[312] Citing, *inter alia*, Love v. Union Cent. Life Ins. Co., 168 Miss. 408, 150 So. 794 (1933), which did not involve affixations made by a tenant.

[313] 189 F.2d at 196.

[314] *Id.*

cut off its continued ownership of those attachments.[315] The only basis for a contrary conclusion would be extending the doctrine that a tenant's right of removal is lost if he does not remove his improvements before the end of his term to the case where one term ends and another begins without interruption of the tenant's possession of the premises. While authority existed for such a proposition,[316] it had been so often repudiated, qualified, and distinguished that it could hardly be regarded as the majority rule.[317] The policy basis for the termination of the tenant's right of removal at the end of his term was undoubtedly that the tenant, having given up possession of the premises, should not be allowed to reenter and disturb the possession of succeeding interests.[318] But the policy would not apply where the tenant did not give up possession of the premises. As stated by the court:

> We think that the better view is that a lessee's right to remove erections made by him in furtherance of the purpose for which the premises were leased continues during his original term and during such further period of possession as he holds the premises under a right still to consider himself a tenant.[319]

To the extent this case can be considered a reflection of Mississippi law,[320] it adds to the Mississippi jurisprudence of tenants' "fixtures" only a condemnation of an obviously unsound proposition.[320.1]

Reviewing Mississippi tenants' "fixtures" cases as a group reveals an alignment with generally prevailing American principles.[321] One exception is an occasional resurrection of the "trade fixtures" test of removability which has largely disappeared from the fixtures law of most states and which seemed at an early date to have been given a decent burial in Mississippi.[322]

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[315] *Id.* at 197.

[316] *E.g.*, Sanitary Dist. v. Cook, 169 Ill. 184, 48 N.E. 461 (1897); Spencer v. Commercial Co., 30 Wash. 520, 71 P. 53 (1902).

[317] *See, e.g.*, Springs v. Atlantic Ref. Co., 205 N.C. 444, 171 S.E. 635 (1933); Blake-McFall Co. v. Wilson, 98 Ore. 626, 193 P. 902 (1920).

[318] *See* Kerr v. Kingsbury, 39 Mich. 150 (1878).

[319] 189 F.2d at 197.

[320] It was followed in Bibb County v. United States, 249 F.2d 228 (5th Cir. 1957), involving land in Georgia. The case was apparently treated as presenting a question of federal law.

[320.1] In Howie v. Baker, 232 Miss. 261, 100 So. 2d 113 (1958), the Mississippi Supreme Court drew upon the law of fixtures in resolving a case of what appears to have been a mutual mistake. It does not seem to have been necessary to apply the law of fixtures, and the case contributes nothing new to that law. It is, therefore, not discussed in the text of this study.

[321] *See* 5 AM. LAW PROP., *supra* note 1, § 19.11, at 45.

[322] See text accompanying note 260 *supra*.

D. Vendor of Chattel Retaining Security Interest

A recent development involving the law of fixtures concerns the rights of conditional sellers of goods which become attached to land. The large volume of such cases demonstrates that the problems involved are not easily solved by litigation or legislation.[322.1]

Several points should be noted before the cases are analyzed:

(1) It is a relatively recent practice to sell goods for installation on land or in buildings, with the goods serving as security rather than the realty. Traditional security interests have been the mechanic's and materialman's liens which are still preferable if there are no prior liens.[323]

(2) The relative value of the manufactured equipment useful in a modern building has increased so substantially in recent years that such fixtures may have a value in place equal to 20 percent or more of the value of the building as a whole.[324]

(3) If the seller of fixtures installed in a mortgaged building is given a preferred claim to the goods sold, he gains priority over the senior lienors. On the other hand, if the mortgagee is preferred, the sale of fixtures will be discouraged and property that could otherwise be made more productive will not be improved.[325]

(4) If a conditional vendor is permitted to remove the fixtures he has sold, he can destroy the productivity of the building, causing a substantial reduction in its value as an economic whole, and he will recover second-hand and dismantled equipment worth a fraction of its value in place. Furthermore, removal will more than likely reduce the value of the building. Yet if the vendor does not have the power of removal, the mortgagee will enjoy an enriched security for which he did not bargain. The conditional vendor normally desires the balance due on the equipment, which is usually essential to the productivity of the land and worth more in place than the amount unpaid. The power of

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[322.1] The summary of *American Law of Property* that follows in the text is a selective one, concentrating on American case law prior to the Uniform Commercial Code [UCC]. In some jurisdictions the law of conditional sales of fixtures, even before the UCC, was significantly affected by statute, notably the Uniform Conditional Sales Act [UCSA]. However, the UCSA was not adopted in Mississippi, and cases decided under it seem to have had little effect on Mississippi fixtures law, so the portion of the treatise discussion which deals with the UCSA is omitted. Discussion of the UCC in the treatise is also omitted as being outside the scope of this article. The discussion of case law in the text is, however, in the past tense to emphasize the point that it is pre-UCC law that is being reviewed.

[323] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 47 n.2.

[324] *Id.* at 47.

[325] *Id.*

removal gives the vendor leverage to obtain payment of the balance.[326]

The simplest cases were those involving litigation between the conditional vendor and his vendee. The sales agreement usually provided for the right of removal, so the vendee had no standing to resist removal on default unless the goods had become so integrated with the realty as to lose a separate identity.[327] Several cases held that removal would not be permitted if to do so would damage the real estate.[328]

When the conditional sale was to a tenant, the rights of the landowner had to be considered. Generally, the conditional vendor could remove the goods if the tenant would have had the same right against the landowner. If unavoidable and substantial damage to the freehold would result from removal, the fixtures were held to have acceded to the land and to belong to the landowner.[329] The standard of material injury to the freehold was one of the most troublesome problems, varying widely among the jurisdictions.[330]

There were two opposing rules dealing with conditionally sold goods placed on mortgaged land. Although the general rule applicable to mortgagor-mortgagee cases was that attachments to land made by the mortgagor became subject to the mortgage if they satisfied the normal objective intention test, the majority of jurisdictions held that goods belonging to a conditional seller did not become subject to the mortgage, short of true accession.[331] The minority rule applied the mortgagor-mortgagee rule against the conditional vendor as well as the mortgagor.[332] The conflict was not of great practical importance, once the law was settled. The minority rule was applied only where the prior mortgage was on record, and, therefore, the conditional seller needed only to gain the mortgagee's assent in order to avoid possible loss.[333] The chief objection to the minority view was that because it worked so harshly in

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[326] *Id.*

[327] *Id.* at 48; *see* Bell v. Bank of Perris, 52 Cal. App. 2d 66, 125 P.2d 829 (4th Dist. Ct. App. 1942), Jones v. Joseph Greenspan's Son Pipe Corp., 381 Ill. 615, 46 N.E.2d 67 (1943); *cf.* Vogel Co. v. Halsey Co., 109 N.J.L. 83, 160 A. 364 (1932); Harvard Financial Corp. v. Greenblatt Co., 261 N.Y. 169, 184 N.E. 748 (1933).

[328] *E.g.*, Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N.W.2d 488 (1945); *see* 5 AM. LAW PROP., *supra* note 1, § 19.12, at 48.

[329] *E.g.*, Globe Automatic Sprinkler Co. v. Boester, 231 Mo. App. 203, 95 S.W.2d 825 (1936); 5 AM. LAW PROP., *supra* note 1, § 19.12, at 48.

[330] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 49.

[331] *E.g.*, *In re* Highland Silk Co., 41 F.2d 405 (3d Cir. 1930) (applying Pennsylvania law); Houlton Sav. Bank v. American Laundry Machinery Co., 9 F. Supp. 112 (D. Me. 1935); North Shore Co. v. Broman, 188 Minn. 433, 247 N.W. 505 (1933).

[332] *E.g.*, Gaunt v. Allen-Lane Co., 128 Me. 41, 145 A. 255 (1929); Waverly Bank v. Haner, 273 Mass. 477, 173 N.E. 699 (1930); Clary v. Owen, 81 Mass. (15 Gray) 522 (1860); 5 AM. LAW PROP., *supra* note 1, § 19.12, at 50. *See generally* 27 B.U.L. REV. 317 (1947).

[333] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 50.

some cases, juries were tempted to find heavy, firmly fixed objects not to be fixtures at all.[334] The precedents were thus very confusing. The minority view was probably a vestige of the English "annexation" test for fixtures.[335] The majority rule involved no great waste of resources, it simply required the mortgagee to be content with the security he bargained for, or if he preferred, to pay the conditional seller in full and avoid removal of the fixtures.[336]

Where land, upon which conditionally sold goods were affixed, was sold or mortgaged, the seller might lose his ownership depending on whether the subsequent mortgagee or purchaser had notice of the seller's claim.[337] As in the licensee and tenant situations,[338] the rule was that, short of accession, the conditional vendor could remove his goods if the mortgagee or buyer of the land acquired his interest with notice of the conditional sales agreement.[339] Statutes in some states permitted recordation of conditional sales agreements, constituting constructive notice to prospective purchasers and mortgagees.[340] When the realty would be substantially damaged upon removal of the affixed goods, however, some cases also required the express consent of the third-party purchaser.[341]

In cases where third persons without notice purchased or mortgaged land to which conditionally sold goods had already been attached, the "intention" test controlled.[342] That test was based on "the presumed unilateral intention of the annexor at the time of annexation."[343] Since this test was applied objectively by the courts, the result usually accorded with the reasonable expectations of the subsequent purchaser or mortgagee. Most jurisdictions held that the subsequent party was entitled to rely on physical appearances and the record, while the conditional seller had to bear the loss for having allowed the chattel to be placed on the land so as to appear a part of it.[344] New York, not following

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[334] *Id.*

[335] *See id.* at 51.

[336] *Id.*

[337] *E.g.*, J.H. Day Co. v. Public Sav. Ins. Co., 85 Ind. App. 78, 151 N.E. 361 (1926); Automatic Sprinkler Corp. v. Rosen, 259 Mass. 319, 156 N.E. 693 (1927); Frigidaire Sales Corp. v. Pospeshil, 257 Mich. 688, 241 N.W. 832 (1932). *But cf.* Heating & Plumbing Fin. Corp. v. Becker, 167 Md. 222, 173 A. 198 (1934).

[338] See the discussion in parts II *B* & *C supra.*

[339] See cases cited at note 338 *supra.*

[340] 4 AM. LAW PROP., *supra* note 1, § 19.12, at 51-52.

[341] *See* Morrow Mfg. Co. v. First Nat'l Bank, 243 Ky. 132, 47 S.W.2d 926 (1932); Smyth Sales Corp. v. Norfolk Building & Loan Ass'n, 116 N.J.L. 293, 184 A. 204 (1936); 5 AM. LAW PROP., *supra* note 1, § 19.12, at 52.

[342] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 52; Niles, *supra* note 236, at 96.

[343] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 52.

[344] Etienne v. Millbrae Golf & Country Club, 27 Cal. App. 2d 452, 81 P.2d 245 (1st

the majority rule, applied the "intention" test on the basis of the agreement between the conditional seller and his buyer. The goods would not become part of the land until the contract price had been paid,[345] and the purchaser or mortgagee of the land acquired no interest in the goods until that time. Similar reasoning was used in "bailment-lease" cases.[345.1] These minority cases were subject to the criticism that the problem was not whether the goods had remained personal property, but whether a "bona fide purchaser without notice should be protected against the secret title-retention agreement."[346]

The earliest reported Mississippi decision involving conditionally sold goods attached to land by the buyer is *Duke v. Shackleford*.[347] Shackleford sold Mary Dellahite equipment for a steam-powered sawmill for which she paid part of the price at the time of sale and gave a note for the remainder. The note expressly provided that Shackleford would retain title to the machinery until the note was paid in full. The land upon which the sawmill was erected was subsequently sold to the Dukes, who had notice of Shackleford's interest. The note was not paid at maturity, and Shackleford brought replevin against the Dukes to recover the machinery. The supreme court affirmed a judgment in plaintiff's favor, holding that, under the conditional sales agreement, title remained in the seller until the full price was paid.[348] "[T]he law annexes to such a sale the right in the seller to recover possession of his property upon default made, even against subsequent *bona fide* purchasers for value without notice."[349] The court concluded, "The agreement of the parties shows that the property, as between them, was to remain personalty, though annexed to the freehold."[349.1] The principal question considered on appeal was whether the seller, in order to maintain the suit, had to return the money he had been paid on the purchase price. The decision was that he did not.[349.2]

The *Shackleford* decision involved the rights of purchasers of land to which conditionally sold goods had already been affixed; the purchasers took the land with notice of the seller's rights (presumably actual

Dist. Ct. App. 1938); Delco Ice Mfg. Co. v. Frick Co., 318 Pa. 337, 178 A. 135 (1935); 5 AM. LAW PROP., *supra* note 1, § 19.12, at 52. These cases should be distinguished from those in which the goods in question belonged to a third person who had not consented to their annexation to the land. There would be no basis for an estoppel against him. *Id.* at 52-53 n.29.

[345] 5 AM. LAW PROP., *supra* note 1, § 19.12, at 53.

[345.1] *Id.* at 53 n.31.

[346] *Id.* at 53.

[347] 56 Miss. 552 (1879).

[348] *Id.* at 553-54.

[349] *Id.* at 554.

[349.1] *Id.* at 555.

[349.2] *Id.* at 554.

knowledge, or at least knowledge of facts that should have alerted them to the probability that such rights existed). In such circumstances the vendees are in no position to claim rights superior to those of their vendor. The court's statement that the goods remained personal property seems unnecessary. Whether goods become real property or remain personal property, a purchaser of goods with notice of a prior seller's rights to them should take subject to those rights.

John Van Range Co. v. Allen[350] involved a conditional seller asserting rights to goods affixed to land against a prior real estate interest. Harrison took possession of hotel property under an executory contract to buy it from J. M. Allen. Under a conditional sales contract with John Van Range Company [Van Range], Harrison purchased and installed in the hotel kitchen a "mammoth" new cooking range. Harrison died after paying a small part of the price of the stove. R. H. Allen took possession as agent and tenant of J. M. Allen. R. H. Allen had actual notice of the conditional sales agreement between Van Range and Harrison.[351] Van Range brought replevin against R. H. Allen to recover the cooking range and lost in the lower court.[352] The supreme court reversed, rejecting the defendants' contention that the stove belonged to J. M. Allen as a fixture attached to the freehold. The agreement between plaintiff and Harrison expressly provided that title to the range should remain in plaintiff until the full purchase price was paid.[353] As the court stated:

> Appellant . . . remained owner of the property, until fully paid for, and appellee had actual knowledge of this contract, and everyone [had] constructive knowledge; for the agreement, properly acknowledged by Harrison, was promptly put to record in the proper office.[354]

Rather gratuitously, the court added that, even in the absence of any agreement, it was not a plausible argument that the property involved was a fixture.[354.1]

> It will be time enough to revise the former rulings of the court on this subject when an attorney of this court can be found to assert that a cooking-stove partakes of the nature of real estate, even though it is fastened to a floor.[354.2]

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[350] 7 So. 499 (Miss. 1890).

[351] *Id.*

[352] *Id.* at 499 (syllabus).

[353] *Id.*

[354] *Id.*, *citing* Duke v. Shackleford, 56 Miss. 552, 555 (1879).

Duke v. Shackleford also involved an agreement between the parties that title should not pass until the full purchase price was paid.

[354.1] 7 So. 499 (Miss. 1890).

[354.2] *Id.*

The result in *Allen* is consistent with the majority view.[355] Although Harrison was not the owner of the hotel when he installed the stove, he was in possession of the property and under a contract to buy it. It has been noted that the courts, including Mississippi's, usually treat such cases as if the vendor were a mortgagee and the vendee an owner-mortgagor.[356] The court's reasoning, however, emphasizes the finding that defendant and his principal had notice of the conditional seller's interest, seemingly implying that such notice was essential to preserve the plaintiff's rights against the defendant and his principal. If the case is to be read that way, it is not in accord with either the majority or the minority view described in the treatise.[357]

The addendum that even in the absence of any agreement, a cooking stove simply cannot be a fixture, even though fastened to the floor, is inconsistent with the general American view[358] and with prior Mississippi cases.[359] Had there been merely a sale by Van Range to Harrison on open credit (which, it is assumed, is the situation the court had in mind in this passage), a strong argument could be made that the cooking range became a part of the realty and that the owner of the realty had a right to it as against his defaulting vendee and the vendee's unsecured creditor.[360] Neither the nature of the goods alone nor the manner of their attachment to the land controls their character as fixtures. Rather, the apparent intention of the person affixing the goods to the land determines whether the goods are to be treated as permanent additions,[361] particularly in "common ownership" cases. When goods are suited to the use to which the land is being put, a finding that they have become fixtures is very likely.[362] If wooden counters and shelves resting on the floor of a shop can be fixtures,[363] it is difficult to understand why a "mammoth" cooking range fastened to the floor of a hotel kitchen is inherently disqualified. *Layne Central Co. v. Gulf Coast Ice Co.*[364] pre-

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[355] *See* 5 AM. LAW PROP., *supra* note 1, § 19.12.

[356] See text preceeding note 22 & following note 39 *supra*.

[357] See notes 333-36 & accompanying text *supra*. It may, of course, have been another instance of judicial overkill, used to strengthen an already strong position, as an analysis of Layne Cent. Co. v. Gulf Coast Ice Co., 171 Miss. 94, 157 So. 84 (1934), seems to confirm.

[358] See notes 333-36 & accompanying text *supra*.

[359] See text accompanying notes 348-51 *supra*.

[360] See note 333 & accompanying text *supra*.

[361] 5 AM. LAW PROP., *supra* note 1, § 19.12.

[362] See the text in part I, especially the discussion of mortgagor-mortgagee cases in subpart *C supra*.

[363] Crumbley Grocery Co. v. Ferguson, 159 Miss. 861, 132 So. 737 (1931), discussed at notes 73-86 *supra*. Of course, *Crumbley* was decided later than John Van Range Co. v. Allen, 7 So. 499 (Miss. 1890), and may, perhaps, be regarded as impliedly repudiating the statement under discussion in *Allen*.

[364] 171 Miss. 94, 157 So. 84 (1934), *noted in* 7 MISS. L.J. 438 (1935).

sented the same problem and results as *Allen*, but its reasoning seems to draw the teeth from the *Allen* court's emphasis on notice. The goods in controversy were artesian well equipment installed by plaintiff for the owner of the land under a contract stipulating that the goods were not only to remain plaintiff's property until paid for, but also should remain personal property until that time. The land was already subject to a deed of trust which was later foreclosed. The land was sold to the beneficiary who claimed title to all the goods furnished by plaintiff. Plaintiff brought suit in equity for the return of the property or its value. A demurrer to the bill was sustained and the bill dismissed. Citing *Allen* and *Shackleford* as authority, the supreme court reversed and reasserted that "the mortgagee, in cases of after-acquired property where title is reserved, has only such rights as the mortgagor would have had if no mortgage had been given."[365]

There is no reference here to notice to the mortgagee of the conditional seller's interest. The justification for giving the latter priority seems to be simply that the mortgagee's interest could attach to no more than the mortgagor acquired through the transaction with the conditional seller, coupled with the observation that the removal of the goods does not prejudice or diminish the mortgagee's security.[366] Thus Mississippi is in accord with the prevailing American case law as to a conditional seller's rights vis-a-vis the holder of a mortgage on the land which was executed prior to the affixation of the conditionally sold goods to the land.[367]

It might be noted that *Layne Central* did not consider the possibility of the mortgagee having improved his position by buying the land at the foreclosure sale. Even if he is then without notice of the conditional seller's interest, he probably cannot be treated as a bona fide purchaser so as to invoke an estoppel against the conditional seller, since he is, in effect, buying from himself.

Polle v. Rouse,[367.1] discussed above,[367.2] involved questions of the relative rights of (1) a conditional seller of goods affixed to the land by the buyer, (2) a tenant on the land, and (3) the holder of a mortgage on the land executed before the goods were affixed. Consistent with the general current of American authority,[367.3] the court held that since the tenant would have the right to remove the goods, as against the landlord, he had such a right against the mortgagee under a mortgage exe-

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[365] 171 Miss. at 99, 157 So. at 86.

[366] *Id.*

[367] See note 333 & accompanying text *supra*.

[367.1] 73 Miss. 713, 19 So. 481 (1869).

[367.2] See note 266 & accompanying text *supra*.

[367.3] See note 251 & accompanying text *supra*.

cuted by the landlord prior to the time the goods were brought on the land.[367.4] By implication, the conditional seller of those goods to the tenant had the same priority over the mortgagee that the tenant would have had. A purchaser of the land at foreclosure could not retain the goods against the claim of the conditional seller to convey.[367.5] The court bypassed the opportunity to consider the possibility of the purchaser's taking free of the conditional seller's interest as a bona fide purchaser of the land in his own right.

Mississippi cases have rarely considered rules that apply when land is mortgaged or sold after goods acquired under a conditional sales contract have been affixed to the land in such a way as to appear to be permanent additions. *Duke v. Shackleford*, discussed above, was such a case but involved purchasers who were assumed to have purchased with notice of the conditional seller's rights. The question of what would suffice to put a purchaser or mortgagee on notice has been discussed only in *Polle v. Rouse*,[368] where the court, in its reasoning, employed a hypothetical situation in which a tenant installed goods on the land and the landlord then executed a mortgage to a third person. The court thought it clear, despite the lack of Mississippi authority (indeed, it cited no authority at all), that the mortgagee would thereby acquire no right to the goods because the mortgagor would have none to transfer and the mortgagee would be on notice of the rights of a tenant in possession.[369] Since the dispute in the case was actually between the original owner of the goods, who had sold them to the tenant while reserving title to them until the full price should be paid, and a purchaser at foreclosure of the mortgage, the court seems to have been implying that if goods are conditionally sold to a tenant who affixes them to the leased land under circumstances which would entitle him to remove them over objection from his landlord, the conditional seller may assert the same right, not only against the landlord, but also against a mortgagee to whom the landlord executes a mortgage on the land after the goods have been affixed to it. This is true even if the goods appear to be permanent additions to the land. The mortgagee, even though he is without direct notice of the conditional sale of the goods, is on notice of the rights of the tenant in possession.[370] The hypothetical appears to be more than dicta since it was a key part of the court's reasoning leading to the conclusion that the conditional seller should prevail on the actual facts of the case.[371]

[367.4] 73 Miss. at 713, 19 So. at 482.

[367.5] *Id.*

[368] 73 Miss. 713, 19 So. 481 (1869).

[369] *Id.* at 717, 19 So. at 482.

[370] *Id.*

[371] This appears to be consistent with the *American Law of Property* summary,

In summary it may be said that the holdings in Mississippi cases involving conditional sales of "fixtures" are consistent with the majority view.[372] However, a number of aspects of the subject which have been ruled on in other jurisdictions have not been given much consideration in Mississippi.

E. Subsequent Chattel Mortgagee

What are the rights of one who takes a security interest, usually in the form of a chattel mortgage, in goods which have already become fixtures? The chattel mortgagee ordinarly could be able to claim rights to the goods no greater than his mortgagor had, being put on notice of the potential claims of real estate interests by the very fact that the goods were attached to land when the chattel mortgage was given. Because the Uniform Commercial Code expressly deals with the priorities between real estate interests and chattel security interests created after goods have become fixtures,[373] it is worthwhile to sift through Mississippi decisions for such situations.

In *Perkins, Livingston & Post v. Swank*,[374] a tenant in possession of land, who had entered into a contract with the owner to buy it, purchased sawmill equipment on credit and installed it on the land. Some months later he gave the seller of the equipment a note for the purchase price, secured by a mortgage on the equipment, which the seller recorded. The tenant failed to meet his obligations either to his landlord-vendor or to his seller-mortgagee. The landlord attached the sawmill equipment for overdue rent. The seller-mortgagee then brought a bill in chancery to enjoin the landlord from proceeding and to foreclose the chattel mortgage. The landlord prevailed. As between him and the tenant, the landlord was considered to have the better claim to the equipment because the tenant, expecting to become the owner of the land, was considered to have intended to make the equipment part of the realty. The seller of the equipment[375] could acquire no better rights than his mortgagor then had unless he qualified as an innocent purchaser for

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though its treatment does not extend the discussion to so complex a fact situation. *See* 5 AM. LAW PROP., *supra* note 1, § 19.12, at 51-55.

A thorough survey of the area reveals that there are no Mississippi cases involving a purchaser or mortgagee of land who acquired his interest from the landowner after the landowner had attached goods acquired on conditional sale in which the possibility of an estoppel against the conditional seller in favor of the purchaser or mortgagee was considered.

[372] See note 333 & accompanying text *supra*.

[373] This study is designed to provide background information for an investigation of the impact of the Uniform Commercial Code on Mississippi fixtures law.

[374] 43 Miss. 349 (1871).

[375] The seller apparently was assumed to have transferred full ownership of the goods to the buyer in the original transaction between them.

value, which the seller did not. This he could not do because (1) he took the mortgage as security for a preexisting debt and thus was not a purchaser for value, and (2) he took the mortgage with notice of the landlord-vendor's claim.[376] The opinion is lacking in detail as to how the seller of the equipment got notice of the landlord's claim, but assuming it to be so, he would have little basis for a claim of priority. As to the statement that he could not be a purchaser for value because the mortgage was taken for a preexisting debt, there might be more room for argument, especially since the debt represented the purchase price of the goods. Pre-Uniform Commercial Code law, however, provided little guidance on the matter.[377]

In *American Laundry Machine Co. v. Citizens National Life Insurance Co.*,[378] the owner of a lot and building installed machinery in the building for the operation of a laundry. The owner executed a deed of trust on the lot to an insurance company to secure repayment of a loan. Subsequently he gave to the seller of part of the equipment a deed of trust and later a chattel mortgage covering all of the machinery to secure payment of the purchase price. The insurance company foreclosed its deed of trust on the land and bought the property at the trustee's sale. The machinery seller then brought suit to foreclose its deed of trust and to have the insurance company's claim to the machinery adjudged invalid. The machinery seller was granted recovery.[379] The decision was ostensibly based on a finding that the machinery had not become fixtures. If not, then it would logically follow that the deed of trust on the lot had no application to the machinery. Possibly the fact that the holder of the machinery mortgage was asserting a claim for the purchase price of at least part of the goods subject to his mortgage influenced the decision, but *Perkins, Livingston & Post* points the other way.[380]

F. Mechanics' Liens

Occasionally it may be necessary to delve into the law of fixtures in order to apply the statutes on mechanics' and materialmen's liens in Mississippi. In *Mississippi Butane Gas System Co. v. Glisson*,[381] residen-

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[376] 43 Miss. at 360, 361.

[377] *See* S. WILLISTON, THE LAW GOVERNING SALES OF GOODS § 620 (rev. ed. 1948); *cf.* 2 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 613-14, at 586-95 (3d ed. 1940).

[378] 107 Miss. 108, 65 So. 113 (1914).

[379] The difficulty of accounting for this decision has been previously discussed and that criticism will not be reviewed here. See text accompanying notes 123-31 *supra*.

[380] 43 Miss. at 360. There are two other cases of this class which have been previously discussed: Crumbley Grocery Co. v. Ferguson, 159 Miss. 861, 132 So. 737 (1931), discussed in the text accompanying notes 73-90 *supra*; and Love v. Union Cent. Life Ins. Co., 168 Miss. 408, 150 So. 794 (1933), discussed in the text accompanying notes 26-30 *supra*.

[381] 194 Miss. 457, 10 So. 2d 358 (1942).

tial property was subject to a recorded deed of trust in favor of Everett. The owners of the land purchased from Mississippi Butane Gas System Company (Mississippi Butane), a gas heating and cooking system, which the company installed in the dwelling. The price was payable in monthly installments. The purchase contract provided that the seller retained title to the goods until their full price was paid and that they should remain personal property. Mississippi Butane brought suit against the owners of their note, seeking to establish a mechanic's and materialman's lien on the gas plant, house, and lot. Everett and the trustee under his deed of trust were made defendants in the action. On their motion the trial judge excluded, as to them, the plaintiff's evidence, ruling that Mississippi Butane had no lien on the building or lot.[382]

The supreme court upheld the ruling, conceding the existence of a statutory lien on the house and lot in favor of a materialman or mechanic who installed a fixture, with priority over a preexisting encumbrance on the realty.[383] The court found that Mississippi Butane had waived the lien by the contractual stipulation that the gas system was to remain personal property. The court recognized the general principle that a retention of title alone does not waive a mechanic's lien on realty.[384] In no case, however, could a holding be found on the effect of a stipulation between the supplier of goods and the buyer-landowner that the goods would remain personal property. The court, noting the "paramount importance" of the parties' intention in the determination of the legal status of the goods and citing *Love v. Union Central Life Insurance Co.* as authority, found the intention here, by express agreement, was that the goods remain personal property until the purchase price was paid. The court stated:

> If the annexed articles remain personal property, the foundation for such property becoming a fixture and part of the realty is absent. We hold that under this contract the seller waived whatever lien on the building and lot he might have had otherwise. If it be said that the seller, by his action to impress and enforce a lien on the building, has waived the provision, the answer is that he has no right to waive it without the consent of the owners of the realty. It is a mutually beneficial provision. It is greatly to the interest of the owner that no such lien exist on the realty.[385]

The court added, perhaps unnecessarily, that Mississippi Butane had constructive and actual notice of the prior deed of trust.

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[382] *Id.* at 464, 10 So. 2d at 359.

[383] *Id.* at 466, 10 So. 2d at 360.

[384] *Id.* at 465, 10 So. 2d at 359; *cf.* 5 AM. LAW PROP., *supra* note 1, § 19.12, at 46-52.

[385] 194 Miss. at 466, 10 So. at 360.

This presents the unusual case of a conditional seller of goods arguing *for* their treatment as fixtures, illustrating the possible boomerang effect of a stipulation in a conditional sales contract that the goods are to remain personal property. Doubtless such a provision is included because of the seller's desire to establish his priority, as to the goods, over all persons with interests in the real estate to which the goods are to be affixed. Yet if the seller subsequently desires to assert a statutory lien against the realty, he may find himself barred by the very contract term he included for his own benefit. The simplest solution, it appears, is to omit such a term from the conditional sales contract. It does not add much to the seller's security in any event. It may be, however, that the buyer will be the one to insist on inclusion of the term in order to protect himself from a mechanic's or materialman's lien on his realty.

In this decision there is a subtle change observable in the "intention" test for fixture determinations.[386] *Love v. Union Central Life Insurance Co.*,[387] cited by the court,[388] emphasized the unilateral intention of the landowner in affixing the goods. In *Mississippi Butane*, the court speaks of the "intention of the parties," as shown by the agreement between the seller and buyer of the goods. A national trend toward an intention test based on the actual or hypothetical agreement of the parties to the transaction in question has been identified by some writers.[389] As long as the dispute is between those parties, the joint-intention test seems likely to produce more satisfactory results than a test based on the unilateral intention of the person making the annexation of the goods to the land as of the time of such annexation. When the interests of third parties become involved, neither test can be relied on as the sole key to satisfactory resolution of the dispute.

The most recent Mississippi fixtures case, *Ziller v. Atkins Motel Co.*,[390] involves application of a mechanic's lien statute. The decision turned on the construction of the statutory provisions relating to mechanics' liens[391] which distinguish between mechanics who work on personal property and those working on real property, including fixtures. The plaintiff, under contract with a motel owner, had overhauled an outdoor motel sign which was imbedded in concrete on land which had been leased from an oil company. The court's entire discussion of the proper classification of the sign was:

> A fixture is something which is affixed or attached as a permanent

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[386] *Id.*

[387] 168 Miss. 408, 150 So. 794 (1933).

[388] 194 Miss. at 466, 10 So. 2d at 360.

[389] 5 AM. LAW PROP., *supra* note 1, § 19.1, at 3 n.2a (Supp. 1962).

[390] 244 So. 2d 409 (Miss. 1971).

[391] MISS. CODE ANN. §§ 85-7-101 to -131 (1972).

> appendage or structural part of the land. Webster's 3rd New International Dictonary at p. 861 (1961). A fixture was originally personal property, but by reason of its annexation to or use in association with real property has become a part of the realty as by means of concrete, plaster, nails, bolts, or screws . . . . 35 Am. Jur. 2d, Fixtures, Sec. 1 (1967); Black's Law Dictionary at p. 766 (4th. ed., 1951). This may often be a question of fact determined by the circumstances surrounding the annexation to the land. Love v. Union Central Life Insurance Co., 168 Miss. 408, 150 So. 794 (1933). Here the facts are undisputed.[392]

Undisputed as the facts may have been, it would seem that prior Mississippi cases would raise a question whether the sign was a fixture, since it was affixed to the land by a tenant and was clearly a "trade fixture."[393] The court's discussion of fixtures, with its emphasis on the manner of affixation of the goods to the land, harks back to the English "annexation" test prior to the development of the "trade fixtures" exception.[394] Yet the actual decision does not seem shocking. Probably the reason is that the question of removability of goods from the land by the tenant was not involved here; at issue was which mechanics' lien statute applied. It is entirely possible that the statutory policy is best served by treating what looks like a permanent part of the land as such, even if it would be found to be personal property when the tenant who affixed it to the land seeks to remove it over the objection of his landlord. Thus, no single test of "fixtures" will be satisfactory for resolving all the various conflicts that develop over whether goods which have been attached to land have become real property or over questions of conflicting claims to property interests in them.

Conclusion

Comparing Mississippi case law on the subject of fixtures with general American law, Mississippi law appears to be generally in accord with the majority rules but betrays many of the same confusions over theory and terminology that complicate American law generally. Two principal factors appear to contribute to the confusion. One is the tendency for terms and concepts derived from the English "annexation" test for fixtures and its "exceptions" to persist in American case discussions, even after the "intention" test appears to have won the day. The other, and more troublesome, is the assumption that a simple label of "fixtures" or "not fixtures" can solve all problems.

While most of the decisions reach sensible conclusions, some do not. At least some of these appear to be attributable to the lack of a sophisti-

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[392] 244 So. 2d at 411.

[393] See notes 257-60 & accompanying text *supra*.

[394] See notes 4 & 5 & accompanying text *supra*.

cated approach to the problems presented by close association of goods with land. There is not a single problem of defining what a "fixture" is and applying the definition, but a widely varying group of problems as to how best to work out the competing claims of persons becoming interested in goods which have been brought into association with land. The more one studies the subject, the less useful the "fixtures" concept seems to be as a device for successful resolution of those disputes. Attention is diverted from the real merits of the competing claims and the policies which ought to govern choices between them to a search for a magic formula that somehow seems to lurk behind the word "fixtures."

With the advent of the Uniform Commercial Code, the development of the law of fixtures has taken a new twist. A study of post-Uniform Commercial Code fixtures law must await subsequent treatment.

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COMMENTS

EXEMPTIONS FROM REGISTRATION UNDER THE SECURITIES ACT OF 1933 AND REGISTRATION OF SECURITIES UNDER THE MISSISSIPPI SECURITIES LAW*

The basic federal regulatory provision regarding the sale of securities is the Securities Act of 1933 [the 1933 Act].[1] Generally, the 1933 Act prohibits the use of the mails or other means of interstate commerce in the offer or sale of securities unless a registration statement has first been filed with the Securities and Exchange Commission [SEC].[2] The definition given the term "security"[3] by the 1933 Act has been liberally construed by the courts, thereby significantly expanding the coverage of the 1933 Act.[4]

The minimum expense for audited financial statements and other information concerning the issuer required in a registration under the 1933 Act has been estimated to be $100,000. When this amount is added to a typical underwriting discount of 10 percent or more for small offerings, the total cost of registering an issue with the SEC frequently renders this source of capital unavailable to small issuers.[5] Therefore, due to the delay, complexity, and expense involved in the registration of an

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* The authors gratefully acknowledge the cooperation of the Securities Division of the State of Mississippi Secretary of State's Office in helping with the preparation of part II of this comment.

[1] 15 U.S.C. §§ 77a-77aa (1970).

[2] *Id.* § 77e. Offers may be made once the registration statement has been filed, but sales can be made only after the SEC has approved the registration statement. *Id.*

[3] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

Id. § 77b(1).

[4] *See, e.g.*, SEC v. Howey Co., 328 U.S. 293 (1945); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

[5] *See* Alberg & Lybecker, *New SEC Rules 146 and 147: The Non-public and Intrastate Offering Exemptions from Registration for the Sale of Securities*, 74 COLUM. L. REV. 622 n.2 (1974).

issue, the exemption of securities from the 1933 Act's registration requirements is usually a desirable goal.[6]

Whether or not an issue is exempted from registration under the 1933 Act, it will likely be subject to regulation by state securities laws.[7] Of course this fact depends entirely upon the laws of the particular state in question. Registration of securities in Mississippi is governed by the provisions of the Mississippi Code commonly known as the "blue sky law."[8] These statutes have for the most part undergone only administrative interpretation and have had little exposure to judicial review. Accordingly, the attorney faced with a securities registration problem must exercise special caution lest he inadvertently violate the Mississippi Act. This comment is designed to familiarize the reader with recent developments concerning exemptions to the registration requirements of the 1933 Act and to provide the practicing attorney with an outline of Mississippi's blue sky law, with special attention focused on the practical aspects of the registration process.

I. EXEMPTIONS FROM THE 1933 ACT

The 1933 Act provides two general types of exemptions from its

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[6] The SEC publishes its estimates of gross proceeds from securities transactions on a monthly basis. The Commission's latest estimates emphasize the importance of exempt transactions in the corporate financing scheme.

Estimated Gross Proceeds from Primary Securities Offerings
(Cash Sales in Millions of Dollars)

	Calendar Years		Last 12				
	1973	1974	Months	Apr. 75	Mar. 75	Apr. 74	Mar. 74
Corporate Offerings	31,877	37,838	45,029	4,367	5,322	3,060	3,217
Public Issues	22,910	31,085	38,002	3,895	4,811	2,316	2,592
Registered	22,756	31,007	37,940	3,892	4,808	2,307	2,587
Regulation A	154	78	62	3	4	9	5
Private Placements	8,967	6,753	7,027	472	511	743	625
Ratio-Private/All Offerings (percent)	28.1	17.8	15.6	10.8	9.6	24.3	19.4

See 34 SEC Statistical Bulletin No. 7, at 633 (July 1975).

[7] Because most state blue sky laws are more restrictive than the 1933 Act, exemption of an issue from registration under the Act does not necessarily exempt the issue from registration under state law. *See* 4 L. LOSS, SECURITIES REGULATION 2634-41 (2d ed. Supp. 1969).

[8] The term "blue sky" originated around the turn of the century when promoters of fraudulent enterprises were said to have sold to an unsophisticated and mainly agrarian population, "public building lots in the blue sky in fee simple." Laws passed in the various states to prevent such frauds became known as "blue sky laws." For a brief history of the blue sky laws, see L. LOSS & E. COWETT, BLUE SKY LAW 1-10 (1958).

registration requirements: (1) transactions exempted by section 4[9] and (2) securities exempted by section 3.[10] Section 19 of the 1933 Act empowers the SEC to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title . . . ."[11] Pursuant to this authority, the SEC recently promulgated rules 146, 147, and 240. Rule 146[12] deems certain transactions by issuers as not to involve a public offering. Rule 147[13] provides that offers and sales by an issuer of its securities are an intrastate offering if all the rule's conditions are met. Rule 240[14] exempts from the 1933 Act's registration requirements certain limited offers and sales of securities by small businesses. Each rule sets forth objective criteria which, if met, create a presumption that an issue is exempted from the 1933 Act's registration requirements.[15] Compliance with the new rules' criteria greatly reduces the risks assumed in issuing exempt securities.

Neither rule 146 nor 147 is exclusive;[16] therefore, an issue may qualify for either the section 4(2) private placement exemption or the section 3(a)(11) intrastate exemption without meeting the criteria of rule 146 or rule 147. In order to qualify an issue which fails to meet the criteria of rules 146 or 147 for the private placement or intrastate exemptions, the issue must comply with the administrative and judicial interpretations existing at the time of the transaction. Interpretations of rules 146 and 147 will be made in light of prior court interpretations of sections

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[9] 15 U.S.C. § 77d (1970). All references to "section" or "rule" in part I of this comment will be to sections of and rules under the 1933 Securities Act.

[10] *Id.* § 77c. Securities issued by the United States, states, political subdivisions of states, religious, educational, benevolent, fraternal, charitable, or reformatory organizations are among those securities exempted by section 3.

[11] *Id.* § 77s.

[12] 17 C.F.R. § 230.146 (1975). For further discussion of rule 146, see Kinderman, *The Private Offering Exemption: An Examination of Its Availability Under and Outside Rule 146*, 30 Bus. Law. 921 (1975).

[13] 17 C.F.R. § 230.147 (1975). *See generally* Comment, *A New Approach to the Intrastate Exemption: Rule 147 vs. Section 3(a)(11)*, 62 Calif. L. Rev. 195 (1975); Comment, *SEC Rule 147—Distilling Substance from the Spirit of the Intrastate Exemption*, 79 Dick. L. Rev. 18 (1974).

[14] SEC Release 5560, 40 Fed. Reg. 6484 (1975).

[15] Prior to the adoption of these rules issuers had three basic alternatives: registering all securities in accordance with the 1933 Act's provisions, finding other means of raising needed capital, or risking liability under the 1933 Act by selling securities believed to be exempted from registration. While it is not within the scope of this comment, a thorough awareness of potential liabilities under the 1933 Act is essential for the attorney involved in any aspect of securities law. For a good discussion of liability under the 1933 Act, see Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971). *See generally* 3 L. Loss, *supra* note 7, at 1692-1998.

[16] *See* SEC Release 5487, 39 Fed. Reg. 15261 (1974); SEC Release 5450, 39 Fed. Reg. 2353, 2356 (1974).

4(2) and 3(a)(11). Prior case law, therefore, remains important for both exemptions and will be briefly discussed prior to a delineation of each rule's qualifying criteria.

A. The Private Placement Exemption

1. Pre-Rule 146

Section 4(2) exempts "transactions by an issuer not involving any public offering"[17] from the 1933 Act's registration requirements. This private placement exemption was loosely defined prior to the adoption of rule 146 because neither the SEC nor the courts had adopted formal criteria defining "transactions by an issuer not involving any public offering."[18] The standards for qualifying under section 4(2) developed on a case-by-case basis and were influenced by SEC releases and no-action letters.[19] An understanding of the uncertainty which clouded the private placement exemption prior to rule 146 enables one to appreciate the objectivity of rule 146.

In 1935, the SEC listed the following as the principal factors to be considered in determining the availability of the private placement exemption: (1) The number of offerees, (2) the offerees' relations with each other and with the issuer, (3) the number of units offered, (4) the size of the offering, and (5) the manner of the offering.[20] The criterion considered most important in practice was the limitation on the number of offerees. The SEC indicated a limit of 25 offerees under "ordinary circumstances" as the maximum number of offerees allowable in an issue under the private placement exemption; however, the numerical test alone was not determinative.[21] The stated objective of the 1933 Act was

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[17] 15 U.S.C. § 77d(2) (1970).

[18] One of Congress's earliest elaborations on an issue "not involving any public offering," stated that registration was not necessary "where there is no practical need for [the bill's] application or where the public benefits are too remote." H.R. REP. No. 85, 73d Cong., 1st Sess. 5 (1933).

[19] "No-action" letters are interpretive, and are enforcement opinions of the Commission staff; they do not represent the Commission's position on the matters. . . . [T]hey are generally regarded by the securities bar as strong indications of what the Commission's opinion might be if it were rendering the interpretive or enforcement judgment.

Alberg & Lybecker, *supra* note 5, at 625-26 n.18. SEC releases are

> administrative interpretations of the law and regulations thereunder to members of the public . . . to help . . . decide legal questions about the application of the law . . . and to aid them in complying with the law.

R. JENNINGS & H. MARSH, SECURITIES REGULATION 37 (3d ed. 1972) [hereinafter cited as JENNINGS & MARSH]

[20] SEC Release 285 (Jan. 18, 1935), *published in* 11 Fed. Reg. 10952 (1946).

[21] [T]he determination of what constitutes a public offering is essentially

full and fair disclosure of the nature of the securities being offered so that an investor would be capable of making an intelligent investment decision.[22] If the offerees were in a relation with the issuer which gave them access to information necessary to make an intelligent investment decision, then there was "no practical need for [the bill's] application . . . ."[23] The United States Supreme Court apparently reached this conclusion in its landmark decision of *SEC v. Ralston Purina Co.*:[24]

> [T]he applicability of section [4(2)] should turn on whether the particular class of persons affected need the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering."[25]

In *Ralston Purina*, unregistered stock had been issued to a wide range of employees.[26] The Court concluded that the offering did not qualify as a private placement since many of the recipients had not been in a position with the issuer which made available the type of information which would have been disclosed if registration had occurred.[27] Those people were unable to make an "informed investment decision" for themselves and needed the protection of the 1933 Act.

The Court cited "an apparent need to define the scope of the private offering exemption" as its reason for granting certiorari in *Ralston Purina*.[28] The lower court decisions subsequent to *Ralston Purina* failed to agree, however, on what definition the Court had given the private offering exemption. Some courts relied on the offeree's investment expe-

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> a question of fact, in which all the surrounding circumstances are of moment. In no sense is the question to be determined exclusively by the number of prospective offerees.

Id.

[22] *See* Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 34 (1959).

[23] *See* note 18 *supra*.

[24] 346 U.S. 119 (1953), *noted in* 4 CATHOLIC U.L. REV. 70 (1954); 52 MICH. L. REV. 298 (1953); 48 NW. U.L. REV. 771 (1954); 21 U. CHI. L. REV. 113 (1953); *and* 3 UTAH L. REV. 519 (1953).

[25] 346 U.S. at 125. Section 4(1) included the private placement exemption at the time of *Ralston Purina*. It was moved to section 4(2) when the Act was amended. Act of Aug. 20, 1964, Pub. L. No. 88-467, § 12, 78 Stat. 580, *amending* 15 U.S.C. § 77d (1958).

[26] Duties performed by those employees acquiring stock under the private placement included:

> artist, backshop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian.

346 U.S. at 121.

[27] The Court cited "executive personnel who because of their position have access to the same kind of information that the Act would make available . . ." as examples of offerees to whom a private placement would be appropriate. *Id.* at 125.

[28] *Id.* at 120.

rience and sophistication,[29] while other courts emphasized the information made available to the offerees.[30] Most courts, however, did adopt the access to information criterion espoused by the Court.[31]

Because the number of offerees had been emphasized in qualifying for the private placement exemption prior to *Ralston Purina*, this exemption had been used primarily for the financing of close corporations and for the sale of blocks of securities to institutional investors.[32] After *Ralston Purina* it was thought that financially sophisticated, wealthy investors were able to "fend for themselves" within the meaning of *Ralston Purina*; therefore, the private placement exemption was used extensively to raise venture capital for incipient corporations by selling securities to wealthy investors.[33] In 1972, however, a Fifth Circuit decision threatened to curtail considerably this use of the private placement exemption. In *SEC v. Continental Tobacco Co.*,[34] the Fifth Circuit held that the mere disclosure through a brochure of the same kind of information found in a registration statement was insufficient to establish a private placement exemption because the requisite issuer-offeree relation did not exist. The court noted:

> The record does not establish that each offeree had a relationship with Continental giving access to the kind of information that registration would have disclosed.[35]

The court then quoted from its opinion in *Hill York Corp. v. American International Franchises, Inc.*:[36]

> [W]here the number of offerees is so limited that they may constitute a class of persons having such a privileged relationship with the issuer that their present knowledge and facilities for acquiring information about the issuer would make registration unnecessary for their protection, then the exemption is available.[37]

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[29] *E.g.*, Lively v. Hirschfield, 440 F.2d 631 (10th Cir. 1971).

[30] *E.g.*, Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

[31] *E.g.*, United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967).

[32] Richardson, *The Private Placement Method of Financing*, 45 CHI. B. REC. 328 (1964).

[33] JENNINGS & MARSH, *supra* note 19, at 409; Alberg & Lybecker, *supra* note 5, at 625.

[34] 463 F.2d 137 (5th Cir. 1972), *noted in* 22 CATHOLIC U.L. REV. 491 (1973); 50 TEXAS L. REV. 1447 (1972); *and* 25 VAND. L. REV. 1274 (1972). *See generally* Comment, *SEC v. Continental Tobacco Co. and SEC Proposed Rule 146 as Attempts to Define a Private Offering: The Insecure Exemption from Registration Under the Securities Act of 1933*, 41 GEO. WASH. L. REV. 582 (1973).

[35] 463 F.2d at 158.

[36] 448 F.2d 680 (5th Cir. 1971).

[37] 463 F.2d at 159, *quoting* Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 688 n.6 (5th Cir. 1971).

The significance of *Continental Tobacco* is that the court appeared to require that a privileged relation exist between each offeree and the issuer which gave the offeree information normally disclosed in a registration statement, and that each offeree be financially sophisticated. Thus, the private placement exemption would be severely limited since few offerees enjoy such a close relation with the issuer of an offering.[38] The resulting uncertainty concerning the private placement exemption led one commentator to conclude that an offer under the exemption was "a calculated business risk at best"[39] and caused the SEC's promulgation of proposed rule 146[40] in 1972 to be welcomed by the securities bar.

Consideration of a section closely related to section 4(2) is essential before a discussion of rule 146 is appropriate. Under section 4(1) of the 1933 Act, persons other than issuers, underwriters, or dealers selling securities in routine trading transactions are exempted from the registration requirements of section 5.[41] For example, a purchaser of securities issued under the private placement exemption may be able to sell the securities pursuant to section 4(1) without registering them.[42] An underwriter is defined as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."[43] If the purchaser in the example above procures the securities with the intent to resell or offers or sells them as part of a distribution, he is an underwriter and thus is ineligible to sell securities pursuant to the section 4(1) exemption.[44] Obviously, the registration requirements of the 1933 Act could be easily circumvented by the use of the section 4(1) exemption if "underwriter" were not broadly defined. Furthermore, because the purchaser is an underwriter, the issuer's private placement exemption is lost.[45] The purchaser's in-

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[38] Considering the policies of the 1933 Act and the private placement exemption, there seems to be little reason for requiring both the privileged relation and the offeree's ability to fend for himself. If a sophisticated offeree is furnished adequate information concerning the issuer, a privileged relation with the issuer is of little help to the offeree in making an intelligent investment decision.

[39] Meer, *The Private Offering Exemption Under the Federal Securities Act—A Study in Administrative and Judicial Contraction*, 20 Sw. L.J. 503, 512-13 (1966).

[40] First Proposed SEC Rule 146, 37 Fed. Reg. 26137 (1972).

[41] The provisions of section 5 shall not apply to the "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(1) (1970).

[42] 1 L. Loss, *supra* note 7, at 182.

[43] 15 U.S.C. § 77b(11) (1970).

[44] Section 4(1) is intended to exempt only trading between individual investors of securities already issued and not to exempt acts of individuals who engage in distributions. *See* SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), *cert. denied*, 314 U.S. 618 (1941).

[45] The issuer's 4(2) exemption is lost because by definition, an "underwriter" is in-

tent or acts subsequent to the private placement determine whether he is an underwriter, thereby also determining the availability of the issuer's section 4(2) exemption.

Ascertaining the purchasers' investment intent presents a substantial problem. Among the factors the SEC formerly considered as evidencing investment intent were the length of time the security was held and whether there was a change in the investor's circumstances which justified the resale of the securities.[46] In order to ensure full and fair disclosure of the character of the offered securities and to replace the subjective standards used in determining whether or not a purchaser of exempt securities was an underwriter, the SEC adopted rule 144.[47] This rule provides that a person who sells restricted securities for his own account in accordance with the terms and conditions of the rule, is deemed not to be engaged in a distribution and is therefore not an underwriter. Rule 144 has five conditions: (1) The restricted security must be beneficially owned for 2 years; (2) the amount of securities which can be resold is limited; (3) the securities must be sold in brokers transactions; (4) there must be adequate current information available to the public in regard to the issuer of the securities; and (5) notice of the sale (form 144) must be filed with the SEC at the time of sale.[48] The SEC no longer considers a change in circumstances of the purchaser of restricted securities in determining if the purchaser is an underwriter. With the adoption of rule 144 the SEC provided objective criteria for determining when a purchaser destroys an exemption previously valid under section 4(2). Rule 146's objective criteria help remove the uncertainty in originally qualifying an issue of the section 4(2) private placement exemption.

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volved in a "distribution," and the SEC regards a distribution as synonymous with "public offering." H.R. REP. No. 1838, 73d Cong., 2d Sess. 41 (1934).

[46] SEC Release 5223, 37 Fed. Reg. 4329 (1972). The holding period is necessary to ensure that the purchaser has assumed the economic risk of investment and is not merely acting as a conduit for the public sale of unregistered securities.

[47] *Id.* Rule 144 is not exclusive; therefore, noncompliance with its criteria does not necessarily result in the loss of an exemption. However, the SEC stated in release 5223 that a person otherwise seeking to establish that he is not an underwriter bears a "substantial burden" of proof.

[48] SEC Rule 144, 17 C.F.R. § 230.134 (1975). The resale of restricted securities is also exempted from the 1933 Act's registration requirements if made in accordance with the conditions of rule 237. Rule 237 is available only for persons other than issuers, affiliates of issuers, brokers, or dealers if the following conditions are met: (1) The issuer is incorporated and has its principal place of business in the United States, (2) the issuer has been a going concern for at least 5 years, (3) the securities have been beneficially owned by the purchaser for 5 years, and (4) the securities are sold in negotiated transactions, not through a broker or dealer. The amount of securities which may be sold under the rule in any 1-year period is limited and notice must be filed with the SEC regional office 10 days prior to sales under the rule. 17 C.F.R. § 230.237 (1975).

2. Rule 146

Rule 146[49] provides that an issuer's offer or sale of securities shall be deemed not to involve a public offering within the meaning of section 4(2) of the 1933 Act if the offering meets all the conditions of the rule.[50] The rule places restrictions on five aspects of the offering: (1) The manner of the offering; (2) the nature of the offerees; (3) the access to or furnishing of information about the issuer; (4) the number of purchasers; and (5) the subsequent sale of securities issued pursuant to the rule. All conditions of the rule must be met for it to be applicable; however, failure to comply with the rule does not preclude the exemption of an issue which complies with the judicial and administrative interpretations pertaining to the private placement exemption in existence at the time of the offering.[51]

a. 146(c) Limitations on Manner of Offering

Section 146(c) prohibits any form of general solicitation or advertising in newspapers, magazines, television, or radio by the issuer or any person acting in the issuer's behalf.[52] Meetings and seminars in which potential investors receive information about the issuer and the securities being offered are also prohibited unless either of two conditions exists: (1) the issuer believes that each person invited to or attending the meeting or seminar "has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment"[53] or (2) the issuer believes that each person invited to or attending the meeting or seminar is "able to bear the economic risk" of the investment, and each such invitee is accompanied by his offeree representative.[54]

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[49] Rule 146 was first proposed in SEC Release 5336, 37 Fed. Reg. 26137 (1972). After receiving suggestions and comments concerning the rule from interested parties, the SEC revised and published the rule in SEC Release 5430, 38 Fed. Reg. 28951 (1973). Final adoption of rule 146 was announced in SEC Release 5487, 39 Fed. Reg. 15261 (1974). The effective date of the rule was June 10, 1974.

[50] The rule exempts an issue only from the registration requirements of section 5. It does not provide an exemption from the antifraud provisions or the civil liability provisions of the 1933 Act. SEC Release 5487, 39 Fed. Reg. 15261 (1974).

[51] A possible result of this is that issuers will now use the criteria of rule 146 as a guidepost in qualifying for the 4(2) exemption in the belief that the courts will act likewise. *Id.*

[52] The restrictions placed on the issuer by the rule extend to all persons acting in the issuer's behalf. Also, any belief required of the issuer by the rule must be based on good cause after reasonable inquiry. SEC Rule 146(c) & (d), 17 C.F.R. § 230.146(c) & (d) (1975).

[53] *Id.* § 230.146(d).

[54] Rule 146(a)(1) defines offeree representative as:

> any person or persons, each of whom the issuer . . . after making reasonable inquiry has reasonable grounds to believe . . . is not an affiliate, director, officer

Any letter, circular, notice, or other written communication concerning securities issued under the exemption is prohibited unless the issuer believes that each person to whom the communication is directed is financially sophisticated and capable of evaluating the merits and risks of the prospective investment or that each person to whom the communication is directed is able to bear the economic risk of the investment.[55] Any written communication to the persons specified above must undertake to provide the information named in rule 146(e)(1).[56]

b. *146(d) Nature of Offerees*

Before an issuer may *offer* securities issued under rule 146, he must, immediately prior to the offer, believe (1) that the offeree is financially sophisticated and "capable of evaluating the merits and risks of the prospective investment"[57] or (2) that the offeree is "able to bear the economic risk of the investment."[58] Before an issuer may make a *sale* of securities issued under rule 146, he must, immediately prior to the sale, believe (1) that the offeree is capable of evaluating the merits and risks of the prospective investment, or (2) that "the offeree and his offeree representative(s) . . . are capable of evaluating the merits and risks of the prospective investment and that the offeree is able to bear the economic risk of the investment."[59]

One feature of rule 146(d) is of particular interest. If an *offer* is made to an unqualified offeree, the exemption is still available if the issuer reasonably believed, immediately prior to making the offer, that the offeree was qualified. Also, if an issuer discovers that he made a *sale*

> or other employee of the issuer; . . . [and] has such knowledge and experience in financial and business matters that he, either alone, or together with other offeree representatives of the offeree, is capable of evaluating the merits and risks of the prospective investment; is acknowledged by the offeree in writing . . . to be his offeree representative in connection with . . . the prospective investment; and discloses to the offeree any relationship he has had with the issuer within two years of representing the offeree.

Id. § 230.146(a)(1). Offeree representatives should consider the registration requirements of the Investment Advisors Act, 15 U.S.C. §§ 80(b)(1)-(21) (1970).

[55] SEC Rule 146(c)(3), 17 C.F.R. § 230.146(c)(3) (1975).

[56] See text accompanying notes 64 & 65 *infra*.

[57] SEC Rule 146(d)(1)(i), 17 C.F.R. § 230.146(d)(1)(i) (1975).

[58] The Commission believes that the determination of "ability to bear the economic risk" will vary with the circumstances. Important considerations are whether the offeree can afford to hold unregistered securities for an indefinite period, and whether, at the time of the investment, he could afford a complete loss.

Id. § 230.146(d).

[59] This belief of the issuer or one acting for the issuer must be based on reasonable inquiry, either before the offer or after the offer and before the sale. *Id.* § 230.146(d)(2).

to an unqualified purchaser, the exemption remains available if the issuer reasonably believed, immediately prior to the offer, that the offeree was qualified under the rule 146(d)(1), and if the issuer believed, immediately prior to the sale, that the purchaser was qualified under rule 146(d)(2).[60]

One of the most significant differences in rule 146 and prior law is that the rule permits the offeree sophistication requirement to be met by either the offeree or his offeree representative. However, many questions concerning the use of offeree representatives are left unanswered by the rule.[61]

c. *146(e) Access to or Furnishing of Information*

Section 146(e) requires that the offeree have access[62] to, or that the offeree or his offeree representative be furnished with, "the same kind of information that is specified in Schedule A of the 1933 Act, to the extent that the issuer possesses such information or can acquire it without unreasonable effort or expense . . . ."[63] The rule provides two means for an issuer to meet the information requirement. An issuer subject to the reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934[64] will be deemed to have furnished the required information if he furnishes an offeree certain reports the issuer is required to file with the SEC, a description of the securities offered, the use to be made of the proceeds, and material changes in the issuer's affairs not disclosed in the documents already furnished the offeree.[65] All other issuers must furnish an offeree or offeree representative the same

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[60] *Id.*

[61] For a discussion of the questions concerning the use of offeree representatives, see Note, *SEC Rule 146—The Private Placement Exemption*, 58 MINN. L. REV. 1125, 1146-50 (1974).

[62] Access can only exist by reason of the offeree's position with respect to the issuer. Position means an employment or family relationship or economic bargaining power that enables the offeree to obtain information from the issuer in order to evaluate the merits and risks of the prospective investment.

SEC Rule 146(e), 17 C.F.R. § 230.146(e) (1975).

[63] SEC Rule 146(e)(1), 17 C.F.R. § 230.146(e)(1) (1975). Schedule A requires 32 items of information, including: the issuer's name, the names and addresses of the directors, the names and addresses of all persons owning 10 percent or more of any class of stock, a statement of the issuer's capitalization, the price at which the security will be offered to the public, the names and addresses of counsel who have passed on the legality of the issue, a balance sheet certified within 1 year of the filing of the registration statement by an independent public or certified accountant, and a profit and loss statement of the issuer for the latest fiscal year and the two statements of the issuer for the latest fiscal year and the 2 preceeding years certified by an independent or certified accountant. 15 U.S.C. § 77aa (1970).

[64] 15 U.S.C. §§ 78a-78hh-1 (1970).

[65] SEC Rule 146(c)(1)(ii)(a), 17 C.F.R. § 230.146(c)(1)(ii)(a) (1975).

information the issuer would have to include in a registration statement if he filed under the 1933 Act, except the issuer can use unaudited financial statements if he cannot obtain audited statements without unreasonable effort or expense.[66] Actual copies of exhibits filed with the SEC as part of the issuer's registration are not required to be furnished each offeree and offeree representative as long as the information contained in them is conveyed to the offeree. Prior to each sale the issuer must give each offeree or his offeree representative the opportunity to ask questions concerning the terms and conditions of the offer and the issuer. As far as practicable, the issuer must answer these questions.[67] Prior to the sale the issuer must also disclose to each offeree (1) the existence of any material relation[68] between the issuer and the offeree representative, (2) the fact that the offeree must bear the economic risk of the investment for an indefinite period because the securities are restricted,[69] and (3) the limits on disposition given in rule 146(h).[70]

d. 146(g) Number of Purchasers

> There shall be no more than thirty-five purchasers of the securities of the issuer from the issuer in any offering pursuant to the rule.[71]

This language appears clear; however, the terms of the statement are specifically defined for purposes of rule 146. The rule states that a purchaser's relatives, spouse, and relatives of his spouse who have the same home as the purchaser are excluded in determining the number of purchasers.[72] Certain trusts, estates,[73] and corporations[74] which buy

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[66] SEC Rule 146(e)(1)(ii)(b), 17 C.F.R. § 230.146(e)(1)(ii)(b) (1975).

[67] SEC Rule 146(e)(2), 17 C.F.R. § 230.146(e)(2) (1975).

[68] A "material relationship" is:

> any relationship that a reasonable investor might consider important in the making of the decision whether to acknowledge a person as his offeree representative.

SEC Rule 146(a)(4), 17 C.F.R. § 230.146(a)(4) (1975). Disclosure of this relation does not relieve the offeree representative of the obligation to act in the interest of the offeree.

[69] See note 46 *supra*.

[70] See text accompanying note 80 *infra*.

[71] SEC Rule 146(g)(1), 17 C.F.R. § 230.146(g)(1) (1975). The Supreme Court refused to adopt a numerical test in *Ralston Purina*, but it did note that the SEC had authority to adopt such a test. SEC v. Ralston Purina Co., 346 U.S. 119, 125 (1953).

[72] SEC Rule 146(g)(2)(i)(a), 17 C.F.R. § 230.146(g)(2)(i)(a) (1975).

[73] Trusts and estates in which a purchaser, his relatives, and certain corporations as defined in note 74 *infra* own 100 percent of the beneficial interest are excluded in determining the number of purchasers. SEC Rule 146(g)(2)(i)(b), 17 C.F.R. § 230.146(g)(2)(i)(b) (1975).

[74] Corporations whose equity securities are collectively owned by a purchaser, his relatives, and the trusts and estates defined in note 73 *supra* are excluded in determining

the restricted securities are also not included as purchasers when determining the number of purchasers under the rule. Any person who purchases securities of the issuer in the amount of $150,000 or more is not included as a purchaser for purposes of rule 146.[75] A corporation, partnership, association, joint stock company, trust, or unincorporated organization which purchases securities exempt under the rule is counted as one purchaser unless it was organized specifically to acquire the securities. If the entity were organized to acquire the securities, each owner of the entity's equity securities is considered a purchaser of the exempt securities.[76]

The rule limits the number of purchasers in an offering to 35; however, the term "offering" is not defined. Through a concept called "integration" the SEC can claim that the offer or sale of securities which are not part of a private placement and the offer or sale of securities sold pursuant to a private placement are actually a single offering. The private placement exemption can thereby be lost, since some of the securities in the integrated offering may fail to meet the criteria of a private offering. The SEC lists five factors to consider in determining whether separate offerings should be integrated into a single offering:

> (a) whether the offerings are part of a single plan of financing; (b) whether the offerings involve issuance of the same class security; (c) whether the offerings are made at or about the same time; (d) whether the same type of consideration is to be received; and (e) whether the offerings are made for the same general purpose.[77]

Rule 146 clarifies the integration problem by providing that any offers or sales of securities issued under section 3 or section 4(2) of the 1933 Act which occur 6 months prior to or 6 months after any offer or sale pursuant to the rule are not to be included as part of the offering made pursuant to the rule.[78] Offers or sales of securities by or for the issuer of a class the same or similar to those offered or sold pursuant to the rule cannot be made during the 6 months prior to or after the offering under rule 146. This factor is important for an offering pursuant to rule 146 since the integration of another offering could increase the number of purchasers to more than 35, thus destroying the private placement exemption.

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the number of purchasers under the rule. SEC Rule 146(g)(2)(i)(c), 17 C.F.R. § 230.146(g)(2)(i)(c) (1975).

[75] *Id.* § 230.146(g)(2)(k)(i)(d).

[76] SEC Rule 146(g)(2)(ii), 17 C.F.R. § 230.146(g)(2)(ii) (1975).

[77] SEC Release 4552, 27 Fed. Reg. 11316 (1962).

[78] SEC Rule 146(b)(1), 17 C.F.R. § 230.146(b)(1) (1975).

e. 146(h) Limitations on Disposition

Rule 146 also places the burden on the issuer to use reasonable care in assuring that the purchasers of exempt securities are not underwriters as defined in section 2(11) of the 1933 Act.[79] The following actions must be taken by the issuer to meet the "reasonable care" requirement:

> (1) [M]aking reasonable inquiry to determine if the purchaser is acquiring the securities for his own account . . . ;
> (2) Placing a legend on the . . . document evidencing the securities stating that the securities [are] not registered under the Act and . . . referring to the restrictions on transferability . . . of the securities;
> (3) Issuing stop transfer instructions to the issuer's transfer agent . . . with respect to the securities . . . and
> (4) Obtaining from the purchaser a signed written agreement that the securities will not be sold without registration under the Act or exemption therefrom.[80]

Adherence to these criteria is not conclusive proof of reasonable care, and some situations may require additional steps by the issuer to satisfy the reasonable care requirement. The actual determination as to whether or not the purchaser is an underwriter is to be made in accordance with rule 144.[81]

f. 146(f) Business Combinations

All conditions of the rule are applicable to business combinations not involving a public offering, except those in 146(d) and 146(h)(4). Rule 145 defines business combinations as the submission of certain plans of reclassification, merger, consolidation, or transfer of assets to security holders, in which "the holders are required to elect . . . whether to accept a new or different security in exchange for their existing security."[82] Unless the reorganization occurs within the conditions of rule 146 or complies with the judicial interpretations of section 4(2), the plan must be registered under the 1933 Act.

The purpose of rule 146 is to replace subjective judicial and administrative standards with objective criteria for complying with the section 4(2) exemption. The rule adds certainty in most areas; however, issuers still have to make subjective judgments under the rule. Determining if an offeree is able "to fend for himself" or is able to "bear the economic risks of investment" are highly subjective judgments. It is easier under the rule for an issuer to satisfy the offeree sophistication

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[79] See text accompanying notes 41 through 45 *supra*.
[80] SEC Rule 146(h), 17 C.F.R. § 230.146(h) (1975).
[81] See notes 47 & 48 and accompanying text *supra*.
[82] 17 C.F.R. § 230.145 (1975).

requirement through the use of offeree representatives than to meet that requirement as it was stated in *Continental Tobacco*.[83] Fulfilling the "access to information" requirement is also easier since that requirement is deemed to be met because of the offeree's position with the issuer or by the issuer furnishing the offeree specified information. Thus, rule 146 is somewhat more liberal than prior law because the rule restricts the number of purchasers, not the number of offerees.

The major fault of the rule lies in its "furnishing of information" requirements. Compliance is relatively simple and inexpensive for issuers already reporting under the 1934 Exchange Act. However, since compliance with the rule's information furnishing requirements is only slightly less expensive and troublesome than the registration of an issue, many small issuers will be precluded from using the private placement exemption pursuant to rule 146. Thus, while creating objective standards and removing uncertainty from the section 4(2) exemption, the SEC has, for practical purposes, limited future use of the private placement exemption to businesses large enough to afford the expense of the rule's detailed reporting requirements.[84] The harshness of rule 146 could be mitigated somewhat if the courts liberally construe the phrase "unreasonable effort or expense," thereby permitting the use of unaudited financial statements by the issuer.[85]

B. The Limited Offers Exemption

1. Rule 240

On January 24, 1975, the SEC, pursuant to authority granted it in sections 3(b)[86] and 19(a)[87] of the 1933 Act, adopted rule 240[88] to provide an exemption for offers and sales of securities by small businesses where

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[83] See text accompanying notes 34 through 40 *supra*.

[84] For an excellent discussion of the many steps required for conducting a rule 146 private placement, see Green & Wittney, *Private Placements of Securities Under Rule 146*, 21 PRAC. LAW. 9 (1975). In addition to explaining the rule, the authors provide a comprehensive set of forms, both for the SEC and the client, prepared for use by several larger New York law firms in rule 146 placements. *See also* Note, *SEC Rules 144 and 146: Private Placement for the Few*, 59 VA. L. REV. 886 (1973).

[85] See note 66 and accompanying text *supra*.

[86] The Commission may from time to time by its rules and regulations . . . add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary . . . for the protection of investors by reason of the small amount involved or the limited character of the public offering . . . .

15 U.S.C. § 77c(b) (1970).

[87] See text accompanying note 11 *supra*.

[88] SEC Release 5560, 40 Fed. Reg. 6484 (1975). The effective date of the rule was March 15, 1975.

the "benefits of registration are too remote."[89] Rule 240 exempts an issuer's[90] offers and sales of its securities from the registration requirements of section 5 of the 1933 Act if all the conditions of the rule are met. The rule limits four general aspects of an offering: (1) The manner of the offering; (2) the number of beneficial owners; (3) the aggregate sales price of the issuer's securities; and (4) resales of the securities.

a. 240(c) and (d) Limitation on Manner of Offering

In order to maintain the limited character of the offering, general advertising and solicitation are prohibited in the offer or sale of securities issued pursuant to rule 240. To ensure that high pressure sales tactics and organized securities distribution media are not employed in the distribution of an offer made pursuant to the rule, the rule prohibits the payment of a commission for the sale of securities, or for the solicitation of prospective buyers.[91]

b. 240(e) Limitation on Aggregate Sales Price

"Aggregate sales price" is defined as all consideration the issuer receives for its securities, "including cash, services, property, notes or other consideration."[92] Consideration the issuer receives for securities issued under the rule plus consideration the issuer receives for other exempted securities sold within 12 months of the offering pursuant to rule 240 must not exceed $100,000.[93] In computing the "aggregate sales price," consideration received from the sale of all securities the issuer sold prior to the effective date of rule 240, certain nonconvertible securities[94] issued to institutional lenders under an exemption other than rule

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[89] *Id.*

[90] The rule is not applicable to offers and sales of securities by issuers who are required to be registered under the Investment Company Act of 1940. SEC Rule 240(b), 40 Fed. Reg. 6484 (1975).

[91] *Id.* at 6485.

[92] "Securities of the issuer" include all securities issued by the issuer and by any affiliate of the issuer. An affiliate of the issuer is a person who controls, is controlled by, or is under common control with the issuer. *See* Note 3, SEC Rule 240(a), 40 Fed. Reg. 6487 (1975).

[93] If an issuer makes an offering under rule 240 in the amount of $60,000 and within a 12-month period attempts another offering of $60,000 under the rule, the first offering's exemption remains valid. However, the rule is not available to exempt the second sale since the total of the two offerings exceeds $100,000, and both were made within a single 12-month period. *See* SEC Rule 240(e), 40 Fed. Reg. 6487 (1975).

[94] Notes which represent purchase money mortgages, or are issued to banks, savings and loans associations, trust companies, insurance companies, certain investment companies, or pension or profit sharing trusts are not included when calculating "aggregate sale price." However, if such notes are issued with warrants giving the holder the right to

240, and securities sold to promoters,[95] directors, executive officers, and full-time employees of the issuer are excluded.

c. 240(f) Limitations on Number of Beneficial Owners

Beneficial owners of securities issued under the rule are limited to 100 or fewer persons. The issuer is required to believe, on reasonable grounds, that this requirement is met, both immediately before and immediately after any offer or sale under the rule. Certain relatives, trusts, estates, corporations, and other organizations which own securities issued under the rule and with whom a beneficial owner has the required relation[96] are deemed not to be separate beneficial owners. Corporations or other organizations formed specifically to acquire the securities offered under the rule are not treated as one beneficial owner; each person with an equity interest in the corporation or organization is a separate beneficial owner of the purchased securities. Institutional lenders are not included within the definition of "beneficial owners," but promoters, directors, executive officers, and employees who purchase securities issued pursuant to rule 240 are included in calculating the number of beneficial owners.

d. 240(g) Limitation on Resale

Securities sold under rule 240 are deemed to be "restricted securities;"[97] therefore, in order not to be an underwriter, a purchaser seeking to resell the securities should comply with the provisions of rule 144.[98] Rule 240, like rule 246, requires the issuer to exercise reasonable care in assuring that purchasers of the exempted securities are not underwriters and defines "reasonable care" similarly to rule 146's definition of that term.[99] Rule 240 states that reasonable care includes, but is not limited to: (1) Reasonable inquiry to determine if the purchaser acquires the securities for his own account, (2) informing the purchaser of the restrictions on resale of the securities, and (3) placing legends on the securities stating that they are not registered under the 1933 Act and that their transferability is restricted.

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acquire an equity interest in the issuer, the notes are included in a calculation of "aggregate sales price." SEC Rule 240(e)(b)(i), 40 Fed. Reg. 6488 (1975).

[95] A promoter is "any person who . . . takes the initiative in . . . organizing the business . . . of an issuer; or . . . who . . . receives . . . 10 percent or more of the proceeds from the sale of any class of securities." SEC Rule 240(a)(4), 40 Fed. Reg. 6487 (1975).

[96] The determination as to whether the required relation exists with a beneficial owner is made just as the number of purchasers is determined under rule 146(g). See text accompanying notes 73 through 77 *supra*.

[97] SEC Release 5560, 40 Fed. Reg. 6486 (1975).

[98] See notes 47 & 48 and accompanying text *supra*.

[99] See text accompanying note 80 *supra*.

Rule 240 requires that notice be given to the SEC's regional office within 10 days of the end of the first month in which sales are made under the rule. The issuer must give notice by filing form 240 which requires information concerning the "issuer, its officers, directors, principal stockholders and promoters, the aggregate sales price of unregistered securities, and the number of beneficial owners."[100] Form 240 becomes public information when it is filed with the SEC. If an issuer fails to file the required notice but complies with all other conditions of the rule, the exemption is available for the first $100,000 of securities sold by the issuer. However, before any subsequent issue can qualify for the rule 240 exemption, notice of the first issue and of the subsequent issue must be given to the regional office.

Because the amount of capital that can be raised in a rule 240 offering is limited, it has received less publicity than rules 146 and 147. However, rule 240 is an attractive alternative to rule 146 and a potentially invaluable new exemption from the 1933 Act's registration requirements. Although the amount of an offering is limited to $100,000 during any 12-month period, the total capital which an issuer can raise over a few years is significant. In a state like Mississippi where many businesses are of medium or small size, the rule should find widespread use. The expense and complexity of rule 146 is avoided in rule 240. Unlike rule 146, rule 240 requires notice to be given the SEC before sales may be made under the rule; however, the notice procedure is relatively simple and inexpensive.

While rule 240 is the small business's alternative to rule 146, there remains a "gap" between the $100,000 limit of rule 240 and the size offering necessary to justify the expense of an offering under rule 146. Businesses which need to make an offering larger than $100,000 but smaller than the size necessary to justify the expense of a rule 146 offering have little alternative but to attempt a private offering under the vague judicial and administrative interpretations of section 4(2). A regulation A offering[101] is one alternative for an offering of this size. Another possible exemption for such an offering is the intrastate exemption; however, as we shall see, an offering pursuant to that exemption is precarious, even under rule 147.

C. The Intrastate Offering Exemption

1. Pre-Rule 147

Section 3(a)(11) of the Securities Act of 1933 exempts from its registration requirements:

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[100] SEC Release 5560, 40 Fed. Reg. 6486 (1975).

[101] 17 C.F.R. §§ 230.251-.263 (1975).

> [a]ny security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.[102]

A single offer or sale of securities issued under the intrastate exemption to a nonresident destroys the exemption.[103] Once the exemption is destroyed, it is the SEC's policy (1) to threaten injunctive proceedings if the offer is continued without registration, (2) require that a registration statement filed for the subsequent issue disclose the issuer's contingent liability for securities already sold in violation of section 5, and (3) insist that the issuer offer rescission to all purchasers of securities sold under the exemption.[104] The severe consequences resulting from the loss of the exemption plus the uncertainty surrounding the terms in section 3(a)(11) led a former chairman of the SEC to conclude: "[A]s a practical matter the intrastate exemption is loaded with dynamite and must be handled with very great care."[105]

In order to facilitate understanding of the exemption's meaning and application, the SEC in 1961 released a restatement of the principles underlying section 3(a)(11).[106] The major problem areas under the exemption were listed as the "issue" concept, the "residency" requirement, and the "doing business" requirement of the issuer. Section 3(a)(11) exempts securities only if they are offered in an "issue" which meets the conditions of the section. Therefore, the determination of which offerings and sales comprise the "issue" is essential in understanding the limits of the exemption.

Two general problems arise in defining an "issue": The integration of other offers with the offering made under section 3(a)(11) and the secondary distribution of the exempt securities to unqualified purchasers. The integration problem encountered under section 3(a)(11) is simi-

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[102] 15 U.S.C. § 77c(a)(11) (1970). In theory the investor does not need the protection of the Act because of his proximity to the issuer and the protection afforded by state laws. This section exempts an offering from the 1933 Act's registration requirements only; the civil liability and anti-fraud provisions of sections 12(2) and 17 of the Act remain applicable. SEC Release 4434, 26 Fed. Reg. 11896 (1961). The statute is strictly construed against an issuer relying on it, SEC v. Sunbeam Gold Mines Co., 95 F.2d 699, 701 (9th Cir. 1938); and the issuer bears the burden of proving the availability of the exemption. SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

[103] 1 L. Loss, *supra* note 7, at 592.

[104] *Id.* at 604.

[105] Gadsby, *The Securities and Exchange Commission and the Financing of Small Businesses*, 14 Bus. Law. 144, 148 (1958).

[106] SEC Release 4434, 26 Fed. Reg. 11896 (1961).

lar to the private placement integration problem.[107] Offers or sales of securities thought not to be part of the issue exempted under section 3(a)(11) are held to be part of a single larger offering. Since some of the offers and sales of the integrated offering do not meet the conditions of section 3(a)(11), the issuance attempted under the section loses its exemption.[108] The "issue" concept prevents an issuer from offering securities under the section 3(a)(11) exemption to in-state purchasers while simultaneously selling otherwise exempt or registered securities to nonresidents.[109] The secondary distribution problem exists because of the difficulty in determining at what point the offering ends. This is similar to the private placement determination of whether a purchaser of exempt securities is an underwriter.[110] The intent of the purchaser largely determines whether the resale of the securities destroys the original exemption. In this instance intent is ascertained primarily by the length of time the purchaser holds the securities. Prior to rule 147, the SEC presumed that resales of exempt securities within 1 year of purchase evidenced a continuation of the original offering.[111] Accordingly, if a resale within this period were made to a nonresident, the original exemption was lost.[112] Resales to residents of securities issued in an intrastate offering are permitted anytime as long as the issuer meets the "doing business" requirement. After a holding period adequate to evidence the purchaser's investment intent, resales of securities issued in an intrastate offering can be made to nonresidents pursuant to section 4(1) if the person making the resale is not an underwriter or a controlling person.[113]

The "doing business" requirement ensures that the offering is local in character by requiring that the investor's funds acquire an interest in the issuer's business within the state. If the proceeds of an offering are to be used entirely for the issuer's purchase of a business outside the

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[107] See text accompanying note 78 *supra*. The factors named therein are determinative of the issue of integration under the section 3(a)(11) exemption.

[108] *See* Jackson Tool & Die, Inc. v. Smith, 339 F.2d 88, 90 (5th Cir. 1964), *reviewed after retrial*, 419 F.2d 152 (5th Cir. 1969).

[109] The SEC held in 1933 that an issue could not be sold partially exempted under section 3(a)(11) and the remainder of the issue otherwise exempted or registered under the Act. SEC Release 97, 11 Fed. Reg. 10949 (1946).

[110] See notes 46 through 48 and accompanying text *supra*.

> To give effect to the fundamental purpose of the exemption, it is necessary that the entire issue of securities shall be offered and sold to and *come to rest only in the hands of residents within the state.*

SEC Release 4434, 26 Fed. Reg. 11896 (1961) (emphasis added).

[111] *Id.*

[112] *E.g.*, SEC v. Hillsborough Inv. Corp., 173 F. Supp. 86 (D.N.H. 1958), *permanent injunction issued*, 176 F. Supp. 789 (D.N.H. 1959), *aff'd*, 276 F.2d 665 (1st Cir. 1960).

[113] SEC Release 4434, 26 Fed. Reg. 11896 (1961).

state, the section 3(a)(11) exemption is not available.[114] Problems arise when the issuer is involved in both intrastate and interstate business; what percentage of the business must be done within the state to make the intrastate exemption available? The SEC states that "the performance of substantial operational activities in the state of incorporation" is required.[115] At least one court requires the issuer's "predominant" business to be located within the state.[116] In determining what portion of an issuer's business must occur and how much of the proceeds of the issue must be invested within the state, the legislative intent of the statute must be considered.[117]

"Residency" is not defined in the SEC's statement, but the SEC construes it to mean "domicile" in the conflict-of-laws sense.[118] Since domicile depends on "physical presence coupled with a mental attitude towards the place that indicates some degree of permanency,"[119] the offeree must normally intend to reside within the state indefinitely to be a qualified purchaser of securities issued pursuant to the intrastate exemption. Whether this interpretation of residency comports with the legislative intent of the statute has been questioned by some commentators.[120] A person temporarily residing in Mississippi who intends to return to his permanent home in Florida is not a qualified offeree for a Mississippi offering under section 3(a)(11). However, a person whose permanent home is in Mississippi but who temporarily resides in Florida is a qualified offeree for a Mississippi issuance under the section. An unqualified sale to the Florida resident temporarily residing in Mississippi would be consummated totally within Mississippi, while a qualified sale to the Mississippi resident temporarily residing in Florida would constitute interstate commerce. This result does not appear to conform with the "local" character of the exemption. An interpretation of "residence" to mean the place where one presently resides seems more consistent with the intrastate concept of the rule.

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[114] SEC v. Truckee Showboat, Inc., 157 F. Supp. 824 (S.D. Cal. 1957).

[115] SEC Release 4434, 26 Fed. Reg. 11896 (1961).

[116] Chapman v. Dunn, 414 F.2d 153, 159 (6th Cir. 1969).

[117] The legislative history of the Securities Act clearly shows that this exemption was designed to apply only to local financing that may practicably be consummated in its entirety within the State . . . in which the issuer is both incorporated and doing business.

SEC Release 4434, 26 Fed. Reg. 11896 (1961).

[118] 1 L. Loss, *supra* note 7, at 598.

[119] D. Vernon, Conflict of Laws § 2.01 (1973).

[120] *E.g.*, 1 L. Loss, *supra* note 7, at 598-600.

2. Rule 147

Rule 147[121] provides that an issuer's offers and sales of its securities made in accordance with all of the rule's provisions shall be deemed to be exempted from the 1933 Act's registration requirements under section 3(a)(11). The rule is nonexclusive; therefore, exemption of an issue can also be obtained through compliance with the existing judicial and administrative interpretations of section 3(a)(11). As in rule 146, the exemption is not available to an issue in technical compliance with rule 147 while also part of a plan or scheme to evade the 1933 Act's registration requirements.

The purpose of the rule is to define terms and clarify conditions of the section 3(a)(11) exemption.[122] The rule clarifies three concepts which were ambiguous and uncertain under the administrative and judicial interpretations of the section 3(a)(11) exemption: (1) What constitutes an "issue," (2) criteria for the issuer to meet in satisfying the "doing business" and "residency" requirements, and (3) qualifications for "resident" offerees and purchasers.

a. 147(b) Part of an Issue

A "safe harbor" preventing the integration of issues is provided by this rule. The issuer's offers and sales of its otherwise exempt or registered securities, occuring prior to the 6-month period immediately preceding or immediately after offers and sales under the rule, are deemed not to be part of an offering pursuant to rule 147. The safe harbor is conditioned on there being no offers or sales of the issuer's securities of the same or similar class within either of the named 6-month periods. If prohibited sales or offers of the issuer's securities are made in either 6-month period the traditional integration tests are applicable.[123] Resales of intrastate exempted securities made within the period of the offering are limited to in-state residents.[124] Resales after the 6-month period are not part of the distribution and can be made to nonresidents.

b. 147(c) Nature of the Issuer

The uncertainty of an issuer's residence under prior law is clarified by the rule. An issuer organized under state law is deemed to be a resident of the state in which it is incorporated. The residence of an

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[121] Rule 147 was proposed in SEC Release 5349, 38 Fed. Reg. 2468 (1973) and adopted in SEC Release 5450, 39 Fed. Reg. 2353 (1974). It is codified at 17 C.F.R. § 230.147 (1975). The effective date of the rule was March 1, 1974.

[122] Preliminary Note 3, SEC Rule 147, 17 C.F.R. § 230.147 (1975).

[123] See text accompanying note 78 *supra*.

[124] SEC Rule 147(e), 17 C.F.R. § 231.147(e) (1975).

issuer not organized under state law is the state in which its principal office is located. An individual is a resident of the state in which his principal residence is located. The "doing business" requirement is satisfied under the rule if: (1) The issuer and its subsidiaries receive 80 percent of their gross revenues during a certain period from within the state; (2) the issuer and its subsidiaries have 80 percent of their assets located within the state prior to any offer under the rule; (3) the issuer intends to use and uses 80 percent of the net proceeds of the rule 147 offering in connection with an intrastate business, the purchase of real property located within the state, or the rendering of intrastate services; and (4) the issuer's principal office is located within the state.

c. 147(d) Offerees and Purchasers: Person Resident

Any offeree corporation, partnership, trust, or other form of business organization is a resident of the state in which its principal office is located at the time of the offer or sale. A business organization formed specifically to acquire securities issued under the rule does not meet the residency requirement unless all of its beneficial owners are in-state residents. Individual offerees are deemed to meet the residency requirement if at the time of the offer or sale their principal residence is within the state. The requirement that an organization formed specifically to acquire securities issued pursuant to rule 147 is deemed to be a nonresident is merely an extension of the familiar substance over form principle.

Rule 147, like rule 146, requires the issuer to take precautions against the exempted securities being illegally traded. Legends placed on the securities stating that they have not been registered under the 1933 Act, stop transfer instructions or a notation in the records of the issuer, and a written statement from each purchaser as to his residence are required by the rule.

Rule 147 offers objective standards for qualifying an issue under the section 3(a)(11) exemption. The previously troublesome question of "residency" under prior law is objectively determined, and the integration of issues is more predictable. The probable result of rule 147 will be to narrow the section 3(a)(11) exemption. Since little guidance exists for qualifying an issue for the intrastate exemption outside rule 147, it is reasonable to assume that some courts will look to the criteria of rule 147 in their considerations of intrastate exemptions attempted outside the rule. In order to prevent undue narrowing of the section 3(a)(11) exemption, courts must remember that rule 147 is nonexclusive. Although determinations as to how much intrastate business was necessary to be "doing business" within a state varied greatly prior to rule 147 and created much uncertainty concerning the intrastate exemption, the harshness of the 80 percent requirement will substantially reduce the number of intrastate offerings.

II. Registration of Securities under the Mississippi Securities Law

A. The Mississippi Securities Law

In the earlier part of the 20th century, Mississippi legislators, like those in other states, were faced with the problem of protecting citizens from unscrupulous investment schemes. To protect the citizenry, the legislature proposed to establish a means for filtering out those securities which the secretary of state found lacking in merit and to set penalties for those who engaged in the sale of "unapproved" issues. With this goal in mind, the Mississippi Legislature undertook to regulate the issuance and exchange of securities within the state.

1. Background of the Mississippi Act

The first Mississippi blue sky laws were enacted in 1916,[125] and underwent amendments in 1930,[126] 1932,[127] 1942,[128] 1958,[129] 1962,[130] 1964,[131] 1970,[132] and 1973.[133] The present act has not changed substantially since 1942,[134] however, and despite the need for some statutory guidance in some of the areas discussed below,[135] the legislature has been slow to consider further amendments of the statute or the adoption of the Uniform Securities Act.[136] The Mississippi Act, while fairly comprehensive in its scope, remains an often ignored law and therein lie many of the problems associated with its effectiveness today.

2. Relation to the Federal Securities Law

When Congress passed the first federal securities act in 1933,[137] nearly every state had previously enacted its own laws governing the

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[125] Act of April 3, 1916, ch. 97 [1916] Gen. Laws Miss. 87.

[126] Miss. Code Ann., ch. 100, art. 2 (1930).

[127] Act of May 18, 1932, ch. 88 [1932] Gen. Laws Miss. 75.

[128] Act of March 19, 1942, ch. 297 [1942] Gen. Laws Miss. 398.

[129] Act of May 8, 1958, ch. 202 [1958] Gen. Laws Miss. 315.

[130] Act of April 10, 1962, ch. 232 [1962] Gen. Laws Miss. 340.

[131] Act of April 22, 1964, ch. 271 [1964] Gen. Laws Miss. 348. Act of April 30, 1964, ch. 272 [1964] Gen. Laws Miss. 358. It was this amendment of the Act which gave the statute its present name—The Mississippi Securities Law.

[132] Act of March 28, 1970, ch. 311 [1970] Gen. Laws Miss. 375.

[133] Act of March 28, 1973, ch. 394 [1973] Gen. Laws Miss. 450.

[134] For an excellent synopsis of the history and background of the Mississippi Act, see Stevens & Little, *Offer and Sale of Corporate Securities* in Corporate Practice (Mississippi Law Institute 1965).

[135] *See, e.g.*, text accompanying notes 183, 204 & 208 *infra*.

[136] 9C Uniform Laws Ann. 84 (The Uniform Securities Act was approved August 25, 1956, by the National Conference of Commissioners on Uniform State Laws).

[137] 15 U.S.C. §§ 77a-77aa (1970).

issuance and sale of securities.[138] The federal act, therefore, should not be considered as a substitute for state blue sky laws but as a supplement to them. Congress has specifically preserved the operation of state securities laws within the boundaries of that state and has not attempted to preempt the field by legislation and regulation.[139] State registration, therefore, constitutes a second, independent constraint on an offering of securities, whether intrastate or interstate.

Perhaps the most significant difference in the state and federal securities laws is found in the respective policies underlying their registration requirements. The state laws were designed to protect citizens against fraud and deceptive sales practices by forcing sellers and promoters to submit their securities to a state administrator for scrutiny before they could be marketed. By requiring registration or qualification of securities before the sale, the state could review the *merits* of an offering before it was allowed to go to the public. This "paternalistic"[140] approach remains in the blue sky laws of most states, including Mississippi.

The federal securities laws, on the other hand, depend on complete *disclosure* requirements to inform the buyer of all pertinent information necessary to make an intelligent decision about the purchase of a security. While the federal objectives allow the purchaser the freedom to make up his own mind without the interference of a government official,[141] the fact remains that few laymen today can read and understand the complicated prospectuses of many corporations. As shall be seen, registration requirements under Mississippi law are an attempt to combine the best of the two approaches in fulfilling the charge to "protect the [securities] subscriber."[142]

Parallels in the federal and state acts are abundant, partially due to the fact that each statute must, in some cases, provide the sole means of securities registration.[143] The Mississippi statute, however, has not

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[138] L. Loss & E. Cowett, *supra* note 8, at 17.

[139] 15 U.S.C. § 77r (1970) expressly reserves to the states jurisdiction to regulate the offering and sale of securities within their borders.

For an argument, on policy grounds, that the federal law should preempt the field, see Armstrong, *The Blue Sky Laws*, 44 Va. L. Rev. 713 (1958).

[140] L. Loss & E. Cowett, *supra* note 8, at 17.

[141] The Securities Act of 1933 was originally termed "the truth-in-securities act." One commentator in the field has written:

> Congress did not take away from the citizen 'his inalienable right to make a fool of himself.' It simply attempted to prevent others from making a fool of him.

1 L. Loss, *supra* note 7, at 128.

[142] Remarks of Ben Hawkins, Deputy Secretary of State for the Securities Division, at Mississippi Bar Association Seminar on Securities Law, February 28, 1975, at Jackson, Mississippi [hereinafter cited as Securities Law Seminar].

[143] Four jurisdictions—Connecticut, Conn. Gen. Stats. Ann. § 36-322 (1969); the

taken advantage of this overlapping of registration requirements by providing for registration by coordination,[144] thus simplifying the mechanics of state registration when an issue is required to be registered with the SEC.

B. *Relations of Other States' Administration of Securities to Mississippi Blue Sky Laws*

As of July 22, 1974, 33 jurisdictions had enacted statutes based on the Uniform Securities Act.[145] The movement is toward uniformity, but even those states adopting the uniform act have included modifications designed to fit their own *modus operandi*. In those states which have not adopted the Uniform Act, the approaches to regulation are more diverse.[146] Of greater importance to the blue sky practitioner is the wide variation in administrative practice, even among states having similar

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District of Columbia, D.C. CODE ENCYCL. ANN. § 2-2401 (Supp. 1970); Nevada (as to interstate offerings), NEV. REV. STAT. § 90.090 (1973); and New York, N.Y. GEN. BUS. LAW § 359-ff (McKinney Supp. 1974)—do not require registration of securities, and only federal registration is required. In the case of any federal exemptions, of course, state registration requirements may still apply.

[144] Coordination refers to the registration procedure whereby documents filed under the Securities Act of 1933, including the prospectus, can be used in a streamlined registration procedure at the state level, when in connection with the same offering. *See* L. LOSS & E. COWETT, *supra* note 8, at 290-99.

[145] Note, *Interstate Scope of the Uniform Securities Act—A Case Analysis*, 1974 WASH. U.L.Q. 421 n.1.

Thirty-one states, the District of Columbia, and Puerto Rico have adopted the Uniform Securities Act in whole or in part: ALA. CODE tit. 53, §§ 28-65 (Cum. Supp. 1973); ALASKA STAT. §§ 45.55.010.-270 (Supp. 1973); COLO. REV. STAT. ANN. §§ 125-1-1 to -1-29 (Supp. 1969); DEL. CODE ANN. tit. 6, §§ 7301-29 (1975); D.C. CODE ANN. §§ 2-2401 to -2418 (1973); HAWAII REV. STAT. §§ 485-1 to -25 (Supp. 1973); IDAHO CODE §§ 30-1401 to -1462 (Supp. 1973); IND. CODE §§ 23-2-1-1 to -2-3 (1971); KAN. STAT. ANN. §§ 17-1252 to -1275 (Supp. 1972); KY. REV. STAT. §§ 292.310-.991 (Supp. 1973); MD. ANN. CODE art. 32A, §§ 13-44 (1971); MASS. ANN. LAWS ch. 110A, §§ 101-417 (Supp. 1974); MICH. STAT. ANN. §§ 19.776 (101)-(418), 19.781-.784 (Supp. 1974); MINN. STAT. ANN. §§ 80A.01-.31 (Supp. 1974); MO. REV. STAT. §§ 409.101-.418 (Supp. 1973); MONT. REV. CODES ANN. §§ 15-2001 to -2025 (Supp. 1973); NEB. REV. STAT. §§ 8-1101 to -1124 (1970); NEV. REV. STAT. §§ 90.010-.210 (1973); N.J. STAT. ANN. §§ 49:3-47 to -76 (Supp. 1974); N.M. STAT. ANN. §§ 48-16-1 to -21, 48-18-16 to -35 (Supp. 1973); N.C. GEN. STAT. §§ 78-1 to -24 (Supp. 1973); OKLA. STAT. ANN. tit. 71, §§ 1-504 (Supp. 1973); ORE. REV. STAT. §§ 59.005 -.995 (1973); PA. STAT. ANN. tit. 70, §§ 1-101 to -704 (Supp. 1974); P.R. LAWS ANN. tit. 10, §§ 851-95 (Supp. 1973); S.C. CODE ANN. §§ 62-1 to -319 (Supp. 1973); UTAH CODE ANN. §§ 61-1-1 to -30 (Supp. 1973); VA. CODE ANN. §§ 13.1-501 to -527.3 (Supp. 1974); WASH. REV. CODE ANN. §§ 21.20.005-.940 (Supp. 1974); W. VA. CODE ANN. §§ 32-1-101 to -4-418 (Supp. 1974); WIS. STAT. ANN. §§ 551.01-.69 (1974); WYO. STAT. ANN. §§ 17-117.1 to -117.29 (Supp. 1973).

See also Comment, *Selling the Blue Sky in Mississippi—A Comparison of the Mississippi Securities Act with the Uniform Securities Act*, 35 MISS. L.J. 421 (1964).

[146] *See generally* L. LOSS & E. COWETT, *supra* note 8, at 30-39.

statutes.[147] Today, every state, as well as the District of Columbia and Puerto Rico, have blue sky laws.[148]

The Mississippi Act provides that the secretary of state maintain cooperation with the securities administrators of other states and with federal administrators.[149] In addition, it suggests that the Mississippi administrator attend the annual convention of the North American Securities Administrators [NASA], or the Convention of the Southern Securities Administrators Association.[150] NASA is a principal contributor to the development of cooperation among blue sky administrators and the uniformity of their practice, while the southern association performs much the same functions on a regional basis.

C. The Administration of the Mississippi Securities Law

The Mississippi Act states that its administration shall be vested in the secretary of state of Mississippi,[151] and he is given the authority to employ examiners, clerical help, and other employees as required to administer the law.[152] The actual administration of the securities law, however, is carried out by the secretary of state's deputy for the securities division, notwithstanding the fact that there is no specific provision in the statute for a delegation of the secretary of state's general powers to a subordinate. Section 75-71-3(6) does authorize a representative designated by the secretary of state to investigate and examine the affairs of persons dealing in securities or of any person whom the secretary of state has "reasonable cause" to believe to be issuing or dealing in securities.[153]

The office of the securities division is located in the secretary of state's office in Jackson. The staff includes the deputy, an assistant deputy, and clerical workers.[154] The deputy and assistant deputy are appointed by the secretary of state. Although an "enforcement staff" is needed, present budgetary limitations do not allow for an increase in

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[147] *Id.* at 62-65.

[148] *Id.* at 30.

[149] MISS. CODE ANN. § 75-71-3(2) (1972).

[150] *Id.* § 75-71-3(4). This section also provides that traveling expenses of the administrator to the conventions will be paid from state funds.

[151] *Id.* § 75-71-3(1).

[152] *Id.* § 75-71-3(3). For the purpose of this comment, the terms "administrator," "securities division," and "securities office" will be used interchangeably, all referring to the personnel who administer the Mississippi Act.

[153] *Id.* § 75-71-3(6).

[154] Telephone conversation with Mr. William Hall, Assistant Deputy for the Securities Division, June 13, 1975 [hereinafter cited as Telephone Conversation].

securities division employees.[155] The result has been a lack of proper investigation and enforcement activities, which, if conducted as provided in the statute, would doubtless result in the discovery of many of the violations which now go undetected.

The Mississippi Act empowers, but does not require, the secretary of state to "make, amend, and rescind rules and regulations" necessary to carry out the objectives of its provisions.[156] Although there is no requirement that the rules and regulations be published when adopted, a handbook[157] published by the secretary of state's office is available for use by the practicing attorney. Also available is a pamphlet containing the Mississippi Securities Law, arranged according to subject matter, rather than by numbered sections. The securities division office will also supply the various required forms[158] to an applicant on request, along with a list of required exhibits and a sample prospectus.

Although the securities division welcomes inquiries of attorneys faced with a securities registration problem, the statute does not empower the administrator to honor requests for interpretive opinions. Office personnel do supply attorneys with advice on an informal basis, and the practitioner who is unfamiliar with the securities registration procedure would be well-advised to ask the securities division personnel for their assistance before undertaking a registration.

The administrator is given broad investigative powers which enable him to conduct examinations into the affairs of any person

> issuing or dealing in or selling, or intending to issue, deal in, or sell securities, or into the affairs of any person when [there is] reasonable cause to believe that such person is or may be issuing, or dealing in or selling securities.[159]

Practically speaking, however, the agency's staff and budget are so limited that the broad powers of inquiry and examination allowed under the statute are rendered moot, and the securities division must depend mainly on the contents of the application forms filed to regulate the sale of securities in Mississippi.[160]

In addition to his duty of qualifying applications for the issuance

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[155] *Id.*

[156] MISS. CODE ANN. § 75-71-3(5) (1972).

[157] GENERAL RULES AND REGULATIONS UNDER THE MISSISSIPPI SECURITIES LAW (As revised October 1, 1974) [hereinafter cited as GENERAL RULES AND REGULATIONS].

[158] Included among these are the application forms for qualification of securities issues and dealers, sample prospectuses, surety bond forms, and for new companies, escrow agreeement and subscription agreement forms.

[159] MISS. CODE ANN. § 75-71-3(6) (1972). *See also id.* §§ 75-71-11 (information the secretary of state has the power to demand), 75-71-35 (investigations of dealers).

[160] Telephone Conversation, *supra* note 154.

of securities, the administrator also has the responsibility of qualifying agency and dealers.[161] The Mississippi Securities Law requires detailed information about the applicant and provides that the dealer furnish the securities division with "such other information in addition to that . . . specified as said secretary of state may deem necessary in order to thoroughly acquaint himself with the character of the business of such dealer . . . ."[162] The securities division has the authority to give written examinations to securities agents and dealers, but the division has been unable to do this because of its rather limited staff. The division has recognized that a problem exists with regard to an objective standard by which to qualify dealers and agents,[163] and it is now in the process of devising examinations which will provide useful insight into an applicant's ability.[164]

The secretary of state has authority to deny the issuance of a permit and to conduct a hearing on the application.[165] If a hearing is necessary, the secretary of state has the power to examine under oath "any persons interested in or connected with" an investment company.[166] In practice, however, the securities division rarely prohibits a sale of securities. The usual procedure is merely to withhold approval of the sale of the stock until the applicant has complied with the administrator's qualification criteria and suggested amendments to his prospectus or has withdrawn his application.[167] As a result, few, if any, hearings have been conducted. This absence of contention may be due to several factors, including the considerable powers given the secretary of state under the statutory provisions; the availability of administrative personnel for conferences to discuss the matter in detail; the desire of the issuer to get his permit as quickly as possible; the fact that the notoriety, delay, and expense

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[161] MISS. CODE ANN. § 75-71-27 (1972). *See also* GENERAL RULES AND REGULATIONS, *supra* note 157, at § 2.

[162] This information includes the dealer's name, residence, and business address, the general character of the securities to be dealt in, the places where the business is to be conducted, and the names of those in charge if the business will not be conducted in person. MISS. CODE ANN. § 75-71-27 (1972).

[163] *Id.* The securities division states that no dealer permit will be issued to any person not having at least 3 years experience in the securities industry. Agents must be qualified by experience of at least 1 year in the securities field or an equivalent training in school in accounting, banking, or business administration. Letter from Ben Hawkins, Deputy Secretary of State for the Securities Division, to Douglas Smith, February 11, 1975, on file in the offices of the *Mississippi Law Journal*.

[164] The administration has adopted one-half of the New York Stock Exchange Examination and plans to base the other half of the test on the Uniform Securities Act. Securities Law Seminar, *supra* note 142.

[165] MISS. CODE ANN. § 75-71-15 (1972).

[166] *Id.*

[167] Telephone conversation, *supra* note 154.

of a lawsuit would be highly prejudicial to an offering, if not prohibitive; and, perhaps most important, the standard of judgment exercised in the administration of the law. The scope of the administrator's discretion will be evidenced in the following discussion of his rules and their relation to the Mississippi Act.

D. The Requirement of Registration of Securities and the Exemptions

1. Scope of the Mississippi Act

The starting point of statutory requirements pertaining to an offering of securities in Mississippi is section 75-71-31. This section requires that before an investment company,[168] dealer,[169] or representative[170] sells or offers for sale[171] any security,[172] the administrator must have given his approval, and a certificate must have been issued. Otherwise, the sale is unlawful unless an exemption applies. The scope of the meaning of the above words is of major significance in the application of the statute, and questions pertaining to their definitions and to the available exemptions are examined below.

Of the three methods of registration generally available under state blue sky laws,[173] the Mississippi Act provides only for registration by *qualification*.[174] Under this method, a complete registration of all securities is required, with the issuance of a certificate of authority to sell conditioned upon administrative approval. The statute forbids any advertisement or other notice of the proposed offering unless the advertisement has received prior approval by the securities division.[175] Under the qualification method, the full impact of the "merit" philosophy, as opposed to "disclosure," can be felt by the issuer.

The attorney engaging in a blue sky law practice should be aware not only of the secretary of state's power to enjoin issues made in violation of the law[176] but also of the possibility of criminal liability for willful

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[168] Every person, corporation, copartnership, limited partnership, company, or association selling or offering to sell securities is defined as a "domestic investment company." MISS. CODE ANN. § 75-71-5(a) (1972).

The only distinction between a domestic and foreign investment company is that the foreign company is organized outside this state. *Id.* § 75-71-5(b).

[169] *Id.* § 75-71-5(d).

[170] *Id.* § 75-71-5(e) (also referred to as an "agent").

[171] *Id.* § 75-71-5(f).

[172] *Id.* § 75-71-5(c).

[173] The three are "notification," "coordination," and "qualification." *See generally* L. LOSS & E. COWETT, *supra* note 8, at 30-39. *See also* note 144 *supra*.

[174] *See* MISS. CODE ANN. §§ 75-71-7, -31 (1972).

[175] It is unlawful for a newspaper to advertise an issue of stock not qualified, and an escrow agent becomes civilly liable if the securities being transacted are not registered. *See id.* § 75-71-31.

[176] *Id.* § 75-71-45.

violations.[177] In addition, persons defrauded in the purchase of securities may bring suit upon the bond required to be posted by statute for the price of the security purchased, interest, and a reasonable attorney's fee.[178] Civil liability may also be based on common law actions of fraud and misrepresentation and in many cases on the federal securities statutes.[179]

2. Exemptions

a. Securities

When a security is to be offered or sold in this state, the requirement of registration may lawfully be avoided only if one of the statutory exemptions of section 75-71-51 applies. Those exemptions are:

> 1. Securities issued or guaranteed by the United States, any state, political subdivision, or governmental agency.
> 2. Securities issued by a national bank or a bank credit or loan association supervised by the United States or issued by a state bank, savings institution or trust company supervised by an agency of any state or the United States.
> 3. Securities issued by domestic savings and loan associations or insurance companies which are supervised by any agency of this state.
> 4. Insurance or endowment policies, annuity contracts or optional annuity contracts issued by a person subject to the supervision of the insurance commissioner, bank commissioner, or any agency of the United States, any state, or the District of Columbia performing like functions.
> 5. Securities issued or guaranteed by railroad or public utilities if their rates or the issuance of their securities are regulated by a governmental agency. Trust certificates in respect to equipment conditionally sold or leased to railroads and public utility companies are also exempt if the securities issued by the company would be exempt.
> 6. Securities issued by nonprofit or charitable corporations, except for "securities made liens upon revenue producing property subject to taxation."
> 7. Securities listed upon any national securities exchange registered under the Securities Exchange Act of 1934 and all securities senior or equal in rank to those so listed.
> 8. Negotiable promissory notes or commercial paper.
> 9. Securities issued or guaranteed by any foreign government with

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[177] *Id.* § 75-71-55. A willful violation is a felony punishable by a fine of not more than $10,000 or imprisonment for not more than 5 years or both.

[178] *Id.* § 75-71-25.

[179] For a discussion of civil liabilities under the Mississippi Act, see Hodge, *Civil Liability Under the Mississippi Securities Act*, 43 MISS. L.J. 597 (1972). *See also* First Mobile Home Corp. v. Little, 298 So. 2d 676 (Miss. 1974).

which the United States has diplomatic relations.
10. Contracts for the sale of real or personal property together with notes or bonds secured by a mortgage or deed of trust on such property, provided all such securities are offered for sale to a single purchaser or a single sale.
11. Securities of Mississippi cooperative operating wholly within the state, provided all shareholders are bona fide residents of Mississippi and no nonresident promoter "is interested therein."
12. Mineral interests given in exchange for labor and material used in drilling oil or gas wells, together with the sale of any mineral interests not less than 1/642 of the whole working interest, and any mineral lease or royalty sales made in exchange for labor, material and machinery used in drilling an oil or gas well.

The fact that a statutory exemption exists does not mean that the issuer, investment company, or dealer need not notify the securities division. The statute requires that a request be made for a formal exemption upon a form furnished by the secretary of state. After the form is submitted to the securities division and approved, a formal certificate of exemption is issued which "shall be prima facie evidence that said securities are exempted from the qualifications and registration provisions . . . ."[180]

b. Transactions

Sometimes confused with the exempt securities provision is the exempt transaction provision of the Mississippi blue sky law. When an exempt transaction occurs, as a general rule no action need be taken with the securities division. Exempt transactions under section 75-71-53 include:

1. Sale of securities by an executor, administrator, guardian, conservator, trustee or receiver in bankruptcy, bank, or trust company regulated by this state or the United States.
2. Sale by a pledge of securities pledged for a bona fide debt, when not made for purposes of avoiding the registration requirements.
3. The sale of securities by a bona fide owner, other than an issuer or underwriter, in an isolated transaction and not made in the course of successive transactions.
4. Stock dividends or other distributions out of earned surplus of a corporation.
5. The issuance of securities in exchange for another corporation's assets or in connection with a consolidation or merger of corporations.
6. Securities issued to shareholders by a corporation solely in exchange for their shares.

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[180] MISS. CODE ANN. § 75-71-51 (Supp. 1974).

7. Sale to a person or institution whose business consists of buying securities.
8. Securities issued pursuant to a right to conversion.
9. The 10 shareholder exemption.
10. Sales by a registered dealer, if information as to the issuer of the securities appears in a recognized manual of securities.
11. Any nonissuer transaction made through a registered dealer pursuant to an unsolicited order to buy, if the dealer acts as an agent for the purchaser and receives compensation solely from the purchaser.
12. The distribution by registered dealers of a preliminary prospectus filed in connection with a registration statement filed under the Securities Act of 1933, when an application for sale of the issue is on file under the Mississippi Securities Law.

Most important among the exempt transactions is the 10-shareholder exemption. The statute provides for an exemption where there will be 10 or fewer shareholders after the offer or sale of a company's stock or securities and the company's authorized capital does not exceed $50,000, or where the offering does not exceed $50,000 and the company will not have more than 10 shareholders at the completion of the offering.[181] If either of these monetary conditions is met, the issuer is exempt from taking any action with the securities division office, and no letter of exemption need be obtained. If, however, the authorized capital exceeds $50,000 or the offering exceeds $50,000, but the shareholders will number 10 or less, affidavits should be filed in the securities division office for each one of the proposed subscribers establishing that they intend to purchase the securities for investment purposes. Affidavits may be filed for each shareholder individually, or a composite affidavit may be used.[182] After the securities division reviews the affidavit, a letter of exemption will be issued.

The key to this exemption is the number of shareholders, but it should be noted that the exemption applies only to transactions where all the company's shareholders are bona fide residents of the state of Mississippi.[183] A letter of exemption will not be granted if even a single nonresident shareholder is involved. Presently, the only method of obtaining the exemption when one of the shareholders is not a bona fide Mississippi resident is to have the company or the other shareholders buy up all the shareholder's stock prior to making the new offering.[184]

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[181] *Id.* § 75-71-53(9) (1972).

[182] Securities Law Seminar, *supra* note 142. The affidavit needs only to track the statutory language.

[183] *Id.*

[184] *Id.* According to the securities division, the nonresident shareholder cannot be included because "we cannot go beyond state lines in granting the exemption to a nonresident."

The section also provides that the shares cannot be acquired for purposes of evading registration requirements "by subsequent offers or sales within the following 24 month period from date of such offer or sale thereof . . . ."[185]

E. The Registration Procedure

1. Registration in General

Registration by qualification is initiated by the issuer filing in the office of the secretary of state a statement showing the "full detail of the plan" upon which it proposes to sell the securities, copies of its prospectus, copies of all contracts to be used with contributors, proposed advertising materials, and an itemized account of the company's financial condition, as well as any other information that the secretary of state may demand.[186] The securities division recommends that as soon as one decides there is a need for qualification, he should "call, write, or come by the securities office and pick up the necessary forms."[187] Only one copy of each required paper need be filed, with the exception that two copies of the proposed prospectus must be filed.

Included with the application forms furnished by the securities office[188] is a standard list of required exhibits, which may not pertain to every qualification and which does not purport to be an all inclusive list of required exhibits—it is attached merely to give the applicant a general idea of the type of information the qualification process requires.[189] As the securities may not be sold until qualification is complete and as the secretary of state has broad powers and discretion over the type of information he may require, the application and any available exhibits should be filed as soon as possible in order to expedite the registration process. Other exhibits which are necessary can be submitted later. This gives the securities division an opportunity to make preliminary examinations and results in a more rapid qualification in most cases.[190]

2. The Prospectus

The most important single item of the application is the prospectus to be used in the proposed sale of securities. Two copies of the proposed

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[185] MISS. CODE ANN. § 75-71-53(9) (1972).

[186] *Id.* § 75-71-7.

[187] Securities Law Seminar, *supra* note 142.

[188] *See* note 158 *supra*.

[189] Securities Law Seminar, *supra* note 142.

[190] *Id.* Onion-skin copies should not be filed as they are not durable. The files are permanently maintained and are frequently examined. Photo-facsimile duplicates, however, are acceptable.

prospectus should be filed with the application.[191] The securities division requires that the prospectus be "full and complete,"[192] giving a complete history of the corporation and all of its activities. The prospectus, in most cases, is the only source of information a subscriber has in determining whether or not to invest his money. The prospectus can be thought of as a bulwark between the issuer and the subscriber, since the prospectus may ultimately serve to protect the issuer also. For example, if the subscriber is supplied with all the material information and it is presented in a readable form, the subscriber will be less likely to make a claim that he was defrauded, thus affording some protection to the company.[193]

Section 224 of the *General Rules and Regulations* of the Mississippi Securities Division describes certain required statements which must be included in a prospectus on the outside front cover and on the inside cover. These statements are set forth in large, capital letters as a warning to the public that the securities are speculative, that they are not registered with the SEC, and anything to the contrary stated in the prospectus constitutes a criminal offense.[194] Additionally, if the prospectus is to be used only in an intrastate sale, as in the case of a rule 147 exemption,[195] a statement must be included on the outside front cover warning the reader that the securities can be sold only to bona fide residents and cannot be resold to nonresidents.[196]

In order to create uniformity among the various prospectuses by different companies, the financial information required in the prospectus must be supplied in accordance with rule B.[197] This rule applies mainly to a "going concern" because it explains the outline, the requirements, the form, and the terminology that is to be used in the balance sheet and the profit and loss statement, the notes thereto, and the surface account for the statements and capital. Therefore, it is a good idea to give a client's accountant a copy of the *General Rules and Regulations* before work is begun on the financial statement.

The financial statement is expected to be "complete." Every item on the balance sheet should be self-explanatory, or a note should be attached referring to the item "so that complete explanations can be made and no questions will remain as to what any part of the financial statement represents."[198] The securities office is very concerned with the

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[191] *Id.* The requirements for the form and content of a prospectus are described in detail in GENERAL RULES AND REGULATIONS, *supra* note 157, at rule A, art. 2.

[192] Securities Law Seminar, *supra* note 142.

[193] *Id.*

[194] GENERAL RULES AND REGULATIONS, *supra* note 157, at rule A, art. 2, § 224(a).

[195] See text accompanying notes 121 through 124 *supra.*

[196] GENERAL RULES AND REGULATIONS, *supra* note 157, at rule A, art. 2, § 224(b).

[197] *Id.* rule B.

[198] Securities Law Seminar, *supra* note 142.

"completeness" requirement because its principal purpose under the Mississippi Act is to "protect the subscriber."[199] The average layperson knows little about a balance sheet or profit and loss statement, but if the notes were to accompany a financial statement, that person will be aided in determining whether the company represented is one in which an investment is prudent.[200]

When the prospectus is reviewed by the securities division, the administrator will mark any changes or amendments necessary on one of the copies and return it to the applicant, along with a letter which explains the changes and additions that may be necessary before qualification is complete.[201] After the applicant completes an amended prospectus, it is again filed in two copies. If it is to be reproduced in its present form for use in the offering, a certificate of authority can be issued without further action.[202] If, however, the prospectus as filed is to be printed, this should be so indicated, and two copies of the printed prospectus must be filed before the certificate can be issued.[203] Filing the printed copies is necessary because the securities division must examine the actual prospectus to be used in the sale of the security.

3. The "New" Company

For the most part, the procedure for registering securities is the same for established and newly formed companies. But, since the newly formed company has no previous record of earnings and has not yet even transacted business, there are several additional obstacles with which the applicant must cope.

One rather unusual problem nearly always arises with the initial sale of securities by a newly formed corporation. Technically, under the Mississippi Securities Law, no company can sell even a single share of stock to any person without its being either qualified or exempt.[204] The Mississippi Business Corporation Act,[205] however, requires that before a corporation may commence business, $1,000 must be paid into the new company.[206] The opinion of the secretary of state regarding this dilemma

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[199] *Id.* The securities division has even stated that "it is unlawful to sell securities to one who is not financially able to risk the loss of the investment." *Id.*

[200] *Id.*

[201] A minimum of 2 weeks is required to process an application. Therefore, any additions to an incomplete application can be expected to cause a substantial delay in qualification of the issue. Letter from Ben Hawkins, *supra* note 163.

[202] *Id.*

[203] *Id.*

[204] MISS. CODE ANN. § 75-71-31 (1972).

[205] *Id.* § 79-3-1 *et seq.* (1972). *See generally* Hodge & Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 MISS. L.J. 371 (1975).

[206] MISS. CODE ANN. § 79-3-111 (1972).

is that the $1,000 be paid in and shares be issued even before the company has qualified under the Mississippi Securities Law, because the corporation cannot make an application with the securities office and file a surety bond unless it is in a position to commence business.[207] Any additional shares that the company intends to issue for assets must be held in abeyance until the securities division has approved the prospectus and has indicated the type of assets that are going to be exchanged for shares.

Another problem which often arises in the formation of a new corporation relates to those instances when a group of people want to accumulate some money before they get their articles of incorporation, and they wish to enlist the aid of various interested investors in raising the money. According to the securities division, this is a "delicate" problem because it is unlawful to offer to negotiate to dispose of any securities for value without having first qualified under the Mississippi Act.[208]

Yet, persons beginning a new enterprise often need some assurance that they will have the necessary capital to complete their plans for incorporation and commencement of business. The solution is found in the following administrative policy developed by the securities division:

> If a group of people, *in concert*, decides to . . . form a corporation they can place their money in a fund among themselves: whether this fund is in a banking institution is immaterial. The establishment of the fund is accompanied by the execution of a simple agreement: (1) That the money will be placed in escrow and held in the fund, (2) that articles of incorporation will be secured, (3) that application will be made to the secretary of state to qualify these securities along with others that are to be sold in the offering, and (4) that if the corporation is not formed, or if the certificate of authority is not granted by the secretary of state's office, then all the money will be returned to the parties to the agreement. Furthermore, the prospectus of the new corporation should indicate that these people intend to subscribe to a certain number of shares of stock at a specified price.[209]

These are the only guidelines promulgated by the securities division for conducting what may be regarded as a preorganization subscription.[210] It is not intended or implied by this policy, however, "that a person can go out and solicit total strangers in a venture which should have [been]

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[207] Securities Law Seminar, *supra* note 142.

[208] *Id.*

[209] *Id.*

[210] Perhaps through legislative oversight, the Mississippi Securities Law does not make any provision for a preorganizational subscription. In fact, the term "preorganizational" is mentioned only once—in the section on optional securities. MISS. CODE ANN. § 75-71-9 (1972).

concluded at one sitting, among a small group of people."[211] It should be noted that this procedure is a departure from the statutory concept that securities must be registered before they can be offered and that no objective criteria are published that might be used in determining whether the administrator will apply this preorganizational policy. The administrator has indicated that he will examine the transaction mainly to discover if the fund is kept in "close concert" among the corporate organizers; if so, the securities division will not interfere.[212]

In any new company the promoters are required to have a 10 percent equity investment—10 percent of the aggregate of the securities proposed to be offered—before the application for a certificate of authority is made.[213] However, money cannot be put into the company and stock issued for this 10 percent investment before incorporation.[214] The application, therefore, must contain an indication that the 10 percent investment will be available upon qualification and that immediately thereafter the funds will be put into the company and the stock issued for the required statutory investment.

4. Options

Optional, preorganization, or incentive securities may not be contracted for nor negotiated for in excess of 10 percent of the authorized capital of the company.[215] Furthermore, the articles of incorporation must contain a detailed plan of the options, the number, and the price, together with any other material information that is required in relation to these types of securities.[216] According to the securities division, this law is most often overlooked in Mississippi corporate practice. In many cases, the administrator has had to require that the corporate charter be amended to include the necessary information on optional securities.[217]

Any options that are issued to promoters of a company must be "fully justified"[218] by showing that the promoter has actually performed in some capacity on behalf of the corporation and for the benefit of the corporation. Evidence of a promoter's benefit to the corporation can be substantiated to the administrator's satisfaction by cancelled checks, receipts of promotional expenses, or other written memoranda.[219] In ad-

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[211] Securities Law Seminar, *supra* note 142.

[212] *Id.*

[213] *See* GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 1, § 134(b).

[214] *See* text accompanying note 204 *supra*.

[215] MISS. CODE ANN. § 75-71-9 (1972).

[216] *Id.*

[217] Securities Law Seminar, *supra* note 142.

[218] *See* GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 135(f)(1).

[219] *Id.*

dition, an itemized statement of all money spent in promoting the venture must be submitted.

Any company that has been in business less than 5 years and wants to issue options must make certain that its option plan contains no *anti-dilution* provision.[220] The rule was promulgated to prevent the company from automatically increasing the number of shares that would be exercisable under a particular option by the use of such means as stock splits, reorganizations, or stock dividends.

Those persons who receive any kind of promotional shares should be warned that it is unlawful to sell or *offer* to sell securities during the period a certificate of authority is granted by the securities division or for 12 months after the certificate expires. When a renewal is granted, the 12-month period begins to run when the renewal time expires.[221]

5. Escrow of the Proceeds

Any company not having been in business 5 years and not having shown a profit for the last 2 years prior to filing an application to issue securities must escrow the proceeds from the sale of stock.[222] Among the forms maintained by the securities division is a typical escrow agreement.[223] This agreement provides that the checks or subscriptions be made payable to the escrow agent of the bank, who is to place all money he receives in a single fund. A copy of the original subscription agreement should be filed with the administrator, a second copy retained by the company, and a third sent to the subscriber. Escrow agreements must provide that at any time the escrow agreement is in effect the secretary of state may release any or all of the funds held in escrow, provided, however, that they are to be used for the purposes set forth in the prospectus.[224] The escrow agreement is automatically renewed when the certificate of authority is renewed and for the same length of time.[225] When the sale of stock has been completed, however, all funds are released from the escrow fund to the corporation.[226]

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[220] *Id.* § 135(i).

[221] *Id.* § 135(g).

[222] Securities Law Seminar, *supra* note 142. *See also* MISS. CODE ANN. § 75-71-47 (1972); GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 135(e).

[223] The escrow agreement maintained by the securities division office has been simplified so that excessive bank charges, which result where there are a number of detailed provisions, can be prevented. Securities Law Seminar, *supra* note 142.

[224] GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 135(e).

[225] Securities Law Seminar, *supra* note 142.

[226] *Id.*

6. Special Rules Concerning the Registration

a. Interest-Bearing Securities

Section 137[227] of the *General Rules and Regulations* states that companies intending to offer interest-bearing securities such as bonds or debentures must maintain a sinking fund from the earnings of the issuer's normal operations to reduce the principal and pay the interest as it becomes due. The rule makes it impossible for a company not having any operating income or net profit to issue interest-bearing securities and thus prevents the marketing of "security"[228] bonds and debentures by companies that may never be able to return the purchaser's investment.

b. Promissory Notes

Promissory notes and commercial papers are exempt from qualification under section 75-71-51.8. Due to problems in defining a "promissory note," a rule was enacted which provides that before a company can issue promissory notes it must have been in business at least 5 years and have shown a net profit for the 2 years prior to the date of application for an exemption.[229]

A certificate of authority is valid for 12 months after issuance and may be renewed prior to its expiration for an additional 12 months by requesting such renewal by letter giving the unsold balance of the offering. If the company has not raised sufficient proceeds from the sale of securities by the time the second renewal period expires, no additional renewals will be granted.[230]

Although the statute sets a maximum limit on promotional or other incidental expenses at 20 percent of the price at which the securities are to be sold,[231] the secretary of state has set the actual limit at 15 percent of the aggregate offering amount.[232] Furthermore, all applications must contain a request that the secretary of state approve the commission which is to be deducted from the sales price. If the commission paid by a company exceeds the amount authorized by the securities administrator, further sale of securities by that company will be barred.

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[227] GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 137.

[228] The securities division has said that because the word "bond" denotes great safety and a good investment to the public, new companies often abused the use of bonds by offering them rather than other securities. Securities Law Seminar, *supra* note 142.

[229] GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 138(a)(4)(i).

[230] *Id.* § 135(e)(5).

[231] MISS. CODE ANN. § 75-71-11 (1972).

[232] GENERAL RULES AND REGULATIONS, *supra* note 157, at art. 3, § 133(a)(1).

F. Denial of a Certificate of Authority and Judicial Review

As previously mentioned, the securities division seldom denies an applicant a certificate of authority. The Mississippi Securities Law provides, however, that the secretary of state shall disapprove an application to sell securities if he finds that:

> (a) the sale of such securities would work a fraud, deception or imposition upon the purchaser thereof; or
> (b) that the securities offered, or to be offered, issued or to be issued, in payment for property, patents, good will, formulae, secret processes, trade brands, franchises, services, titles or rights in and to intangible property and other like assets, are in excess of the reasonable value thereof; or
> (c) that the issuers or guarantors of such securities are insolvent or in failing circumstances; or
> (d) that the sale of such securities is a mere scheme of either the issuers or the applicant to dispose of securities of no real intrinsic value at the expense of the purchasers thereof . . . .[233]

Prior to any order denying a qualification or permit, the secretary of state is required to send the applicant a notice of an opportunity for a hearing, although an actual hearing does not have to take place before the denial is ordered.[234]

The statute also provides that should a permit be denied, an appeal may be taken to the Chancery Court of the First Judicial District of Hinds County within 20 days of the order.[235] The procedure for an appeal is initiated by filing a written notice signed by the applicant stating (1) the order from which the appeal is taken, (2) the grounds upon which a reversal or modification of the order is sought, and (3) a demand for a certified transcript of the record of the order.[236]

G. Summary

The foregoing discussion reveals that the Mississippi Securities Law contains its share of traps for the unwary. The merits of the present system of securities qualification and regulation—its flexibility, and the availability of unpublished information on an informal basis—mask many of the shortcomings of the act. Furthermore, the discretion afforded the administrator, even if exercised in the most equitable manner, ultimately serves to shield potential abuses from judicial review. A

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[233] MISS. CODE ANN. § 75-71-15 (1972). The administrative discretion inherent in applying the "merit" standard will be obvious after reading the provisions of this section.

[234] *Id.* § 75-71-21. The procedure to be followed in conducting an administrative hearing is outlined in this statute.

[235] *Id.* § 75-71-23.

[236] *Id.*

greater use of the administrator's rulemaking power, coupled with a legislative provision empowering the secretary of state to give interpretive opinions, would do much to clarify the present securities law for the practitioner and for the public, and should suffice until there is a need for a complete revision of Mississippi's blue sky laws.

III. Practical Considerations

The two preceding sections were designed to give the practicing Mississippi attorney a description of some of the routes which can be taken when a corporation seeks to issue securities. In securities law, as in every other area of law, each case is different, and the preferred route will of course depend upon the facts of each business situation. A few common registration situations which might confront a Mississippi lawyer are described below.

A. The Medium-sized Corporation with 10 or Fewer Shareholders

Although rule 146 allows as many as 35 purchasers within the scope of the exemption, many smaller corporations would not have more than 10 offerees in a position to qualify for the "access to information" criteria under rule 146(e).[237] Therefore, for purposes of this example, let us assume Corporation X, a Mississippi corporation actively engaged in textile manufacturing in Jackson, Mississippi, wishes to raise funds for the acquisition of a new plant by offering 600,000 shares of common stock at $2 a share. Corporation X has a six-member board of directors and four corporate officers. These 10 persons are the only stockholders of Corporation X at the present time. One of the directors is a doctor who lives in Monroe, Louisiana.

The attorney's initial step is to find an exemption under the 1933 Act.[238] The rule 240 exemption cannot be utilized in our hypothetical case between the offering exceeds the $100,000 limitation.[239] An intrastate exemption could be considered in Corporation X's offering plan only if the Louisiana director is excluded from the list of offerees, and no offers are made to any other nonresidents. An attorney should remain cognizant of the fact that an intrastate exemption is completely destroyed if an offer is made to even a single nonresident, regardless of whether he actually purchases any stock.[240]

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[237] See notes 62 & 63 *supra*.

[238] The federal registration requirements should be considered first in most cases, as filings under the federal regulations not only involve greater expense but also are more strictly enforced.

[239] See text accompanying note 93 *supra*.

[240] See text accompanying note 103 *supra*.

A private placement exemption might best be applied in the case of Corporation X. The primary obstacle to overcome would be establishing a reasonable ground for believing each offeree to be "capable of evaluating the merits and risks of the prospective investment and . . . able to bear the economic risk of the investment."[241] The fact that corporate officers and directors may be able to purchase the entire Corporation X offering tends to recommend the private placement exemption. On the other hand, if a friend or relative of an insider decides to buy some of the Corporation X stock and he is not furnished with the same information that would have been included on a 1933 Act registration statement, the private placement exemption fails.[242]

After determining whether a federal exemption is available, the attorney should then attempt to find an exemption from registration under the Mississippi Securities Law. The list of exempt securities under section 75-71-75 provides a number of statutory exemptions for particular types of stock, including securities listed on any national securities exchange.[243] The attorney who chooses to rely only upon a statutory security exemption should not forget that a request for a formal exemption must be submitted to the secretary of state.

If Corporation X's offering can qualify as an exempt transaction under the 10 shareholder exemption,[244] a letter of exemption can be acquired from the securities division by filing affidavits[245] stating that each stock purchaser is a bona fide resident of the state of Mississippi. Of course the issuer is faced with the same problem here as in the case of the intrastate exemption on the federal level—the offering must be restricted to state residents.

B. The Small Issue

Assume Corporation Y is a small corporation located on the Mississippi River and engaged in the repair and maintenance of towboats and barges. The corporation is financially secure but wants to fund the purchase of $100,000 in new equipment by an offering of common stock. Assume further that Corporation Y can fund this offering through sales to its present shareholders and a few of their friends. However, the directors of Corporation Y have determined that in addition to this year's financial needs, they will probably need to make a similar offering next year. Furthermore, several of the present shareholders are not resi-

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[241] See note 58 *supra*.

[242] See text accompanying note 27 *supra*.

[243] See text accompanying notes 179 & 180 *supra*.

[244] MISS. CODE ANN. § 75-71-53(a) (1972).

[245] See note 182 *supra*.

dents of Mississippi, but all stockholders want to purchase some of the new offering.

The situation outlined above appears tailormade for the new rule 240 exemption from 1933 Act registration.[246] The offering meets the $100,000 aggregate sales price limitation, and no general advertising or solicitation will be necessary.[247] In this situation, Corporation Y could not use an intrastate exemption and still sell securities to its nonresident shareholders. If private placement were used, there would be the problem of showing the requisite knowledge of business operations and ability to bear the risk.[248]

On the state level, however, Corporation Y cannot obtain the statutory 10 shareholder exemption[249] because of nonresident stockholders, even though no more than 10 shareholders will be affected.[250] Therefore, Corporation Y must comply with the registration requirements under the Mississippi Securities Law.[251]

C. Corporation with Securities Listed on National Securities Exchange

Corporation Z is engaged in the manufacture of wood products and maintains several plants in Mississippi and one each in Alabama and Georgia. Corporation Z is a Mississippi corporation and maintains its corporate headquarters in Jackson. Its common stock is listed on the American Stock Exchange. Corporation Z wants to purchase a plant in southern Louisiana that will enable it to make more productive use of its wood byproducts. The Louisiana plant is presently owned by a single individual who wants cash rather than an exchange of stock as consideration. Therefore, Corporation Z has decided to offer 500,000 shares of preferred stock through its underwriter at $2.50 a share in order to fund the undertaking.

The small business exception under rule 240 is not available, of course, because the $100,000 amount has been exceeded. In examining the possibility of using the intrastate exemption, the main question will be whether an underwriter can realistically expect to raise $1¼ million in capital within a state which has traditionally had to look elsewhere for its capital.

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[246] See text accompanying note 89 *supra*.

[247] See SEC Rule 240(c) & (d), 40 Fed. Reg. 6484 (1975).

[248] See text accompanying note 59 *supra*. One should keep in mind the fact that when an exemption to the registration requirements is sought by an issuer of securities, the burden of establishing the exemption is on the issuer.

[249] *See* MISS. CODE ANN. § 75-71-53(a) (1972).

[250] See note 183 *supra*.

[251] See text accompanying notes 188 through 203 *supra*.

The private placement exemption would also be unavailable, unless the issuer can ascertain 35 (or fewer) prospective buyers whom he reasonably believes[252] to have the financial means to collectively purchase 500,000 shares of stock, and each of whom has access to all material aspects of the Corporation Z business, either through their own personal observations or through a representative.[253] In this situation we will assume that 15 individuals from each of the four states named above have qualified under the rule 146 criteria[254] for a private placement exemption.

Although the 10 shareholder exemption is not available on the state level, the securities themselves are exempt from registration under the Mississippi Securities Law because they are senior in rank to the stock already listed by Corporation Z on a national exchange.[255] Nevertheless, since stock will be sold in states other than Mississippi, the attorney handling the stock offering must examine the blue sky law requirements of each state in which stock will be sold to assure that its securities registration procedures are fulfilled or that an exemption is obtained.

Conclusion

While institutional, debt-type financing is adequate and perhaps most suitable for meeting short-term problems of financing, it is not an adequate source of the risk capital needed for growth in the modern corporate situation. Therefore, every corporation, if it is not to stagnate, must at some time resort to the "public" capital source, the individual investor. When such an attempt at raising capital is made, even if the offer is to but one person, the corporation has placed itself within the ambit of the federal and state securities laws. In these situations the small corporation frequently has neither the resources, time, desire, nor expertise to consult a large out-of-town or out-of-state law firm specializing in the securities field. Therefore, it will fall to the corporation's counsel to decide what can and cannot be done without violating either federal or state law. In view of the potential liabilities under both, such a decision must be well considered.

Since Mississippi has not yet experienced the economic boom which her resources and abilities promise, many Mississippi practitioners have not yet dealt with some of the problems of corporate financing which loom on the economic horizon. It has been the authors' purpose to give these practitioners a brief look at several of the more useful rules and standards under the federal law and to clarify the mechanical steps

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[252] See text accompanying notes 59 & 60 *supra*.

[253] For a definition of "offeree representative," see note 54 *supra*.

[254] See text accompanying notes 57 through 76 *supra*.

[255] *See* Miss. Code Ann. § 75-71-75(7) (1972).

needed for qualification under the state's blue sky laws. The thrust of this comment, then, has been at identifying potential pitfalls; it should not be taken as an exhaustive review of securities law.

Thomas A. Cook
Douglas Johnston Smith, Jr.

CONSTITUTIONAL LIMITATIONS UPON THE USE OF STATUTORY CRIMINAL PRESUMPTIONS AND THE FELONY-MURDER RULE

Every state in the United States, except one,[1] has some form of felony-murder statute.[2] Although the statutes, as well as the court decisions interpreting them, vary substantially, all of them are based upon the common law concept that one who has done a wrongful act (the underlying felony) should be responsible for the results of his actions (the homicide).[3]

At early common law a person was responsible for his acts regardless of his state of mind.[4] Accordingly, one accused of murder had to take an oath that he had done nothing to place the deceased "further from life or nearer to death."[5] It was the 12th century before the mental element of the crime of murder was considered;[6] and, it was not until the 16th century that the principle of malice aforethought became the critical element of murder.[7] At its inception, malice aforethought meant a deliberate murderous intent formed prior to the act.[8] It was extended[9] until it covered such homicides as the nonintentional killing of an officer of the law while resisting arrest[10] and the accidental killing during the

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[1] While Ohio has no such separate category of murder, Ohio courts are very prone to finding intent to kill from an act known to be dangerous to life. State v. Salter, 149 Ohio St. 264, 78 N.E.2d 575 (1948) (chloroform used in committing rape was act known to be dangerous to human life). *See generally* Robbins v. State, 8 Ohio St. 131 (1857); Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956).

[2] For a compilation of the felony-murder statutes in the United States, see MODEL PENAL CODE § 201.2, Comment (Tent. Draft No. 9, 1959).

[3] *See generally* R. MORELAND, THE LAW OF HOMICIDE 5 (1952).

[4] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 470 (2d ed. 1911).

[5] 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 23 (3d ed. 1923).

[6] R. MORELAND, *supra* note 3, at 5-9. According to Professor Moreland the original source of the expression *mens rea* was S. Augustinas, *"Ream linguan no facit nisi mens rea."* (An act does not make one guilty unless his mind is guilty.) *Id. See also* Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

[7] 4 W. BLACKSTONE, COMMENTARIES *178. Malice aforethought is the "grand criterion which now distinguishes murder from other killing." *Id.* at *198.

[8] Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 545 (1934); Royley's Case, 79 Eng. Rep. 254 (K.B. 1612).

[9] The first extension was probably to situations where an intentional killing without any apparent motive was deemed to be murder. It was said by one ancient writer that the act "proceeded of former malice meditated within his own mind, howsoever it be kept secret from the sight of other men," LAMBARD, EIREHARCHA 239 (1610), *as quoted in* Perkins, *supra* note 8, at 546 & n.74. Another extension was the inclusion of situations where the accused did not intend to cause death but only inflict great bodily harm upon the victim. *See* State v. Calabrese, 107 N.J.L. 115, 151 A. 781 (Ct. Err. & App. 1930); Commonwealth v. Marshall, 287 Pa. 512, 135 A. 301 (1926).

[10] Mackaley's Case, 79 Eng. Rep. 239 (K.B. 1611); Perkins, *supra* note 8, at 563-65.

commission of a wrongful act.[11] It is this latter extension of malice aforethought that is the progenitor of the present felony-murder rule.

The first major refinement of this early articulation of the felony-murder rule was its limitation to situations where the death occurred during the commission of a felony.[12] As the number of felony-classified crimes began to grow, it became obvious in both England and the United States that the rule would have to be limited still further.[13] The English courts limited the rule to killings resulting from any felony committed in a dangerous manner,[14] while American courts limited the rule to killings resulting from felonies that were inherently dangerous.[15] Both were trying to limit the application of the felony-murder rule to only those deaths that were foreseeable by the accused. In essence, this limitation was an attempt to close the gap between the *mens rea* (malice aforethought) of the felon and the *actus rea* (the killing itself) of the homicide;[16] a gap which is due to the legal fiction on which all felony-murder statutes are based—one who perpetrates a felony has the intent to commit murder.[17] This intent arises because the felon is deemed to have contemplated the inherent dangerousness of the situation and acted in disregard of this danger. However, the factors that are considered in determining whether the felony is, in fact, inherently dangerous are severely limited. In the majority of states, the legislatures have

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[11] Lord Docre's Case, 72 Eng. Rep. 458 (K.B. 1535); COKE, THIRD INSTITUTE 56 (6th ed. 1680) ("If the act be unlawful it is murder.").

[12] The earliest proponents of this slightly limited application of a finding of murder were Lord Hale, 1 HALE P.C. 465 (1678), and FOSTER, CROWN LAW 258-59 (2d ed. 1791). *See also* 4 W. BLACKSTONE, COMMENTARIES *192.

[13] These further limitations are due to the increase in the number of felonies and in the stricter requirement of culpability. At the time the felony-murder rule was first developed, the penalty for the commission of the underlying felony itself was death; the crime (the underlying felony or the resultant killing) for which the accused was hanged, therefore, made little difference. Subsequently, some crimes were made felonies which involved relatively minor offenses. Many involved no serious danger to life and called for much less severe punishment than death. The underlying offense, therefore, became primarily important. W. LAFAVE & A. SCOTT, CRIMINAL LAW 545-46 (1972); *see, e.g.*, People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (felonious sale of liquor which led to the drunken purchaser's death from exposure could not be the basis for felony-murder conviction).

[14] *See, e.g.*, Rex v. Jarmain, 2 All E.R. 613 (1945); Regina v. Serne', 16 Cox Crim. Cas. 311 (1887).

[15] People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); Simpson v. Commonwealth, 293 Ky. 831, 170 S.W.2d 869 (1943) ("The intent to perpetrate a different felony, during the commission of which a person is killed, supplies the elements of malice and intent to murder . . . ."). *See also* Witt v. State, 205 Ind. 499, 185 N.E. 645 (1933).

[16] *See* Byrn, *Homicide Under the Proposed N.Y. Penal Law*, 33 FORDHAM L. REV. 173, 174 (1964).

[17] *See, e.g.*, People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1965) (the use of the felony-murder rule circumvents the necessity of proving premeditation).

determined which felonies, in the abstract, are inherently dangerous and, therefore, a court in a particular case may not consider the circumstances under which the crime took place.[18]

The difficulty the courts have had with the felony-murder rule is apparent when one analyzes the varied factual situations that have arisen. One of the most trying for the courts has been the killing committed by one other than the accused or his co-felons.[19] The issue becomes whether the initial felony supplies both *mens rea* and the *actus rea*. The states have disagreed over whether such a situation falls within the felony-murder rule. *Miers v. State*,[20] holding that such a situation would be murder, exemplifies the bizarre sequence of events that could occur. A neighbor of *X* observed two men in the process of robbing *X*. The neighbor engaged in a struggle with one of the two robbers and managed to wrestle a gun away from the would-be felon. The neighbor then hit the robber on the head with the gun causing it to discharge. As a result *X* was killed. The court held that the felons' liability was based upon causal connections: by initiating the chain of events that led to *X's* death, they should be held responsible as if they had pulled the trigger themselves.[21]

Therefore, one may be convicted for murder even though he did not intend to commit murder and, in fact, did not kill. The courts have similarly applied the rule where a policeman[22] or the victim of the felony[23] retaliates and kills either one of the felons or, by accident, someone else. One writer claims that the extension of the felony-murder rule to such situations has led juries to rebel against convictions by adopting a homemade rule against fortuities.[24] Accordingly, some courts have created ingenious methods of circumventing the application of the rule.[25] Nevertheless, while many courts have adamantly refused to ex-

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[18] *See generally* W. LaFave & A. Scott, *supra* note 13, at 547-49.

[19] The person directly causing the death may be the victim, a policeman, or an innocent bystander.

[20] 157 Tex. Crim. 572, 251 S.W.2d 404 (1952).

[21] *Id.* at 574, 251 S.W.2d at 407.

[22] People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952); Johnson v. State, 386 P.2d 336 (Okla. Crim. 1963). *But see* State v. Andreu, 222 So. 2d 449 (Fla. 1st Dist. Ct. App. 1969); Commonwealth v. Myers, 438 Pa. 218, 261 A.2d 550 (1970).

[23] Johnson v. State, 252 Ark. 113, 482 S.W.2d 600 (1972); People v. Reed, 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (Dist. Ct. App. 1969). *But see* State v. Garner, 238 La. 563, 115 So. 2d 855 (1959); State v. Majors, 237 S.W. 486 (Mo. 1922).

[24] 9 Duquesne L. Rev. 122, 125 (1970). *See also* Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

[25] Some of these are:

(1) *A strict reading of the applicable felony-murder statute*—People v. Washington, 62 Cal. 2d 777, 402 Pa.2d 130, 44 Cal. Rptr. 442 (1965) (the felony-murder statute only applied where the killing was done by the felon or one of his accomplices); People v. Wood,

tend the application of the felony-murder rule,[26] most courts have reluctantly accepted its constitutional basis as sound.[27]

I. PRESUMPTIONS

"[A] presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[28] A presumption renders one fact to be true when another fact has been proved. The proven fact, therefore, shifts the burden of proof upon the presumed fact.[29] The burden of proof[30] and the consequences which the adversary party faces if he fails to meet this burden vary with each type of presumption.

There are three general types of presumptions: conclusive, rebuttable, and permissive. A conclusive presumption does not merely shift the burden of proof of the presumed fact; it automatically deems the presumed fact true when the truth of the proven fact is established. The presumed fact is not in issue and, therefore, its truth cannot successfully

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8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960) (death must occur in the furtherance of the felony, either actually or constructively by the accused). The language of MISS. CODE ANN. § 97-3-19 (Supp. 1974) would seem to call for a similar interpretation.

(2) *Res gestae*—The question to be decided here is whether the felony and the killing are part of one transaction: People v. Ford, 65 Cal. 2d 141, 416 P.2d 132, 52 Cal. Rptr. 228 (1966) (robbery held to have been terminated before killing); People v. Smith, 323 N.Y. 239, 133 N.E. 574 (1921); State v. Diebold, 152 Wash. 68, 277 P. 394 (1929). *But see* People v. Salas, 7 Cal. 3d 812, 500 P.2d 7, 103 Cal. Rptr. 431 (1972) (robbery was not terminated since the robber had not won his way to a place of safety); Commonwealth v. Lussier, 333 Mass. 83, 128 N.E.2d 569 (1955). A majority of jurisdictions hold that an attempted felony is not ended merely because the perpetrators have decided not to proceed and were merely trying to escape when the killing took place. W. LAFAVE & A. SCOTT, *supra* note 13, at 555-58.

(3) *Killing must be independent of the felony—See* State v. Fisher, 120 Kan. 226, 243 P. 291 (1926); State v. Shock, 68 Mo. 552 (1878) ; People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927); People v. Huther, 184 N.Y. 237, 77 N.E. 6 (1906). *See generally* Note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059 (1970).

[26] The Pennsylvania decisions present a perfect history of the growing displeasure and distrust for the felony-murder rule. *See* Commonwealth v. Myers, 438 Pa. 218, 261 A.2d 550 (1970); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958); Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955); Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947).

[27] *See, e.g.*, Gore v. Leeke, 284 S.C. 67, 199 S.E.2d 755 (1973).

[28] C. MCCORMICK, LAW OF EVIDENCE § 342 (E. Cleary ed. 1972) [hereinafter cited as MCCORMICK].

[29] *Id.*; 9 J. WIGMORE, A TREATISE ON EVIDENCE § 2490 (3d ed. 1940) [hereinafter cited as WIGMORE].

[30] The term "burden of proof" includes two separate burdens:

(1) the burden of producing evidence on a given issue; and

(2) the burden of persuading the trier of fact that the alleged fact is true. MCCORMICK, *supra* note 28, § 336, at 783-84.

be rebutted by the adversary party. Most authorities do not consider the conclusive presumption a true presumption, but instead a rule of substantive law.[31]

Rebuttable presumptions are mandatory deductions. Unlike the conclusive presumption, the adversary may present evidence to rebut the presumed fact. Unless the adversary party meets this evidentiary burden, however, the presumed fact is established when the underlying fact is proved.[32] The evidentiary burden which is shifted to the adversary and the substantive effect of the presumption once the burden is met varies. In some cases only the burden of producing or coming forward with the evidence is shifted. In these cases, no specific quantum of evidence is necessary in order to successfully rebut the presumption. It is only necessary that the adversary party produce admissible rebuttal evidence.[33] Under this approach, when the rebutting evidence is admitted, the presumption disappears and the trier of fact is left with the discretionary function of weighing the evidence in order to determine the truth of the presumed fact.[34] Under an alternative theory, after rebuttal evidence is admitted the presumption does not disappear.[35] The adversary party must prove to the jury beyond the requisite quantum of evidence involved in the specific case that the presumed fact is not true.[36] The presumption shifts not only the burden of producing evidence, but also the burden of persuasion. An instruction is given to the jury regarding the burden of persuasion necessary to overcome the extant presumption.[37]

Permissive inferences are presumptions which are neither mandatory nor conclusive.[38] The trier of fact is free to infer the truth of the presumed fact from the established truth of the proven fact. The infer-

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[31] McCormick, *supra* note 28, § 342, at 804; Wigmore, *supra* note 29, § 2492.

[32] McCormick, *supra* note 28, § 342, at 803.

[33] *See, e.g.*, Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). A presumption was interpreted as casting upon the defendant "the duty of producing some evidence" to rebut the presumption.

[34] J. Thayer, A Preliminary Treatise on Evidence at the Common Law 313 (1898). Thayer first espoused the view that presumptions should only be allowed to shift the burden of producing evidence and that to allow a presumption to shift the burden of persuasion as well constituted a denial of constitutional due process by denying the defendant his constitutionally protected presumption of innocence.

[35] E. Morgan, Basic Problems of Evidence 31 (1962) [hereinafter cited as Morgan].

[36] The requisite quantum of evidence, of course, is determined by the type of case involved: beyond a reasonable doubt in criminal cases, and by a preponderance of the evidence or by clear and convincing proof in civil cases.

[37] Morgan, *supra* note 35, at 29. *See, e.g.*, Western & A.R.R. v. Henderson, 279 U.S. 639 (1929).

[38] *See* Wigmore, *supra* note 29, § 2491, at 288, espousing the view that an inference is not literally a presumption since it involves fact rather than law.

ence shifts neither the burden of coming forward with the evidence nor the burden of persuasion. The trier of fact is simply instructed that the existence of one fact may be inferred from the established truth of another. The trier of fact, however, is not required to find in a manner consistent with the inference but is free to decide the interrelationship between the established fact and the fact to be inferred.[39]

The courts and legislatures have continued to create and recognize the validity of presumptions for various reasons.[40] The primary consideration has been that the existence of the proved fact renders the presumed fact so probable that both judges and legislators have felt justified in assuming its truth.[41] The effect of a presumption upon the substantive rights of the parties is potentially great.[42] In civil cases a presumption may work in favor of either side. The presumption may establish prima facie evidence of a critical element in the plaintiff's case which overcomes a directed verdict for the defendant and allows the plaintiff to reach the jury without offering any direct evidence of the element. The same mechanism, however, may establish sufficient rebuttal evidence to warrant a directed verdict, so that the plaintiff's case never reaches the jury. Except for the constitutionally mandated presumption of innocence, presumptions in criminal cases are invariably drafted to aid the prosecution. Through the presumption, an otherwise defective case may survive a directed verdict and ultimately result in a conviction. In order to overcome the presumption, the criminal defendant may be forced to take the stand, waiving his constitutional right to remain silent. These consequences have resulted in fifth and fourteenth amendment due process limitations upon the use of presumptions.

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[39] 1 S. GREENLEAF, EVIDENCE § 44, at 144 (16th ed. 1899).

[40] (1) To make unnecessary the introduction of evidence upon an issue made by the pleadings but not likely to be the subject of serious dispute. . . . (2) To avoid a procedural impasse in a situation where evidence as to the presumed fact is lacking. . . . (3) To avoid such an impasse created by the impossibility of securing legally competent evidence of the presumed fact. . . . (4) To produce a result in accord with the preponderance of probability. . . . (5) To require the party having peculiar means of access to the facts and evidence of the facts to make them known to the court. . . . (6) To reach a result deemed socially desirable wherever the basic fact exists. . . . (7) To reach a result deemed desirable for a combination of two or more of the foregoing reasons.

MORGAN, *supra* note 35, at 32-33.

[41] MCCORMICK, *supra* note 28, § 343, at 811. "A presumption . . . means that common experience shows the fact to be so generally true that courts may notice the truth." Greer v. United States, 245 U.S. 559, 561 (1918).

[42] MCCORMICK, *supra* note 28, § 344, at 811.

II. Constitutional Limitations

The evolution of constitutional limitations upon the use of statutory criminal presumptions represents an increasing judicial awareness of the inherent danger in removing the fact-finding process from the jury to the legislature. The requisite degree of probability that the presumed fact exists has increased significantly.[43]

The primary focus of judicial attention has been upon the probability that the presumed fact is true when the truth of the provable fact is established.[44] The standard applicable to criminal presumptions is rooted in civil litigation. In *Mobile J. & K.C.R.R. v. Turnipseed*,[45] a Mississippi statute[46] made proof of injury inflicted by trains prima facie evidence of negligence on the part of the railroad. The railroad company alleged that the presumption deprived it of the general rule of law which placed upon one who sued in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect to a duty owed to the plaintiff. The Supreme Court held that legislative power to create presumptions was within the general power of government. The court recognized that there were limitations on the power, but concluded:

> [I]t is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.[47]

Although the primary focus is upon the "rational connection between the fact proved and the ultimate fact presumed" the procedural effect of the presumption is also an important consideration. In *Western & A.R.R. v. Henderson*,[48] a case involving an almost identical substantive statutory presumption as in *Turnipseed*, the Court overturned the presumption, distinguishing *Turnipseed*:

> The Mississippi statute created merely a temporary influence of fact that vanished upon introduction of opposing evidence. . . . [The statute] of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and

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[43] *Compare* Yee Hem v. United States, 268 U.S. 178 (1925), *with* Turner v. United States, 396 U.S. 398 (1970).

[44] *See* Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943); Yee Hem v. United States, 268 U.S. 178 (1925).

[45] 219 U.S. 35 (1910).

[46] Miss. Code § 1985 (1906), *as amended*, Miss. Code Ann. § 13-1-119 (1972).

[47] 219 U.S. at 43.

[48] 279 U.S. 639 (1929).

> is to prevail unless such testimony is found by the jury to preponderate.[49]

The two statutes seemed almost exactly the same as far as the interrelationship between the proven fact—death caused by a train—and the presumed element—negligence on the part of the railroad. The critical distinction is the Court's interpretation of the statute in *Turnipseed* as merely shifting the burden of going forward with the evidence, whereas the *Henderson* presumption shifted not only the burden of going forward but also the burden of persuasion.

The "rational connection" test was first applied to a criminal case in *Yee Hem v. United States*.[50] The petitioner was convicted of knowingly concealing opium after illegal importation. The statute provided that possession alone would be sufficient evidence for conviction unless the defendant could explain his possession to the satisfaction of the jury. Applying the *Turnipseed* rational connection test, the Court held it was not an illogical inference that opium found in this country after its importation had been prohibited was unlawfully imported:

> Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption.[51]

In response to the argument that the presumption denied the defendant his fifth amendment right to remain silent by requiring him to take the stand in order to rebut the presumption of guilt, the Court held that there was no violation of fifth amendment rights where the defendant was merely required to set forth rebuttal evidence. The situation would be the same if the government, instead of creating its case through the use of a statutory presumption, were to create a prima facie case through proven facts. In both situations the defendant must put on rebuttal evidence or his case is lost. The fact that the only available source of rebuttal evidence is the defendant's own testimony arises from the force of circumstances and not from any compulsion forbidden by the Constitution.[52]

Other arguments have been used to deter the focus of a court's scrutiny from the interrelationship between the proved and the presumed fact. In *Ferry v. Ramsay*,[53] the Court looked to the scope of

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[49] 279 U.S. at 643-44. The statute made the railroad companies liable for damages unless the company could show that their agents exercised reasonable care and diligence.

[50] 268 U.S. 178 (1925).

[51] *Id.* at 184-85.

[52] *Id.* at 185.

[53] 277 U.S. 88 (1928).

legislative authority. Since the statutory liability was within the scope of legislative authority, the fact that the legal theory was based upon an imperfect presumption was not considered critical. In *Ferry*, depositors sued the directors of a bank for the amount of their deposits which were accepted after the bank had become insolvent but before it was closed. A Kansas statute made it unlawful for any bank director to assent to the receipt of deposits after he had knowledge of the bank's insolvency. The fact that the banking institution was insolvent or in failing circumstances at the time of receipt of the deposit constituted prima facie evidence of knowledge of the insolvency and assent to the deposit by the officer. The Court held that since the Kansas Legislature could have predicated the director's liability upon mere receipt of deposits after the bank had become insolvent regardless of any knowledge or assent, the presumption was not unconstitutional.

> The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it.[54]

Another alternative constitutional justification for the creation of a statutory presumption was discussed by the Court in *Morrison v. California*.[55] Even though the necessary interrelationship between the presumed fact and the proven fact might be lacking, a presumption could be upheld due to the comparative convenience of placing the burden of proof upon the defendant.[56] In *Tot v. United States*,[57] the government argued that there were two alternative tests by which statutory presumptions[58] should be measured: "rational connection between the facts proved and the fact presumed" and "the comparative convenience of producing evidence of the ultimate fact."[59] The Court held:

> We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational

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[54] *Id.* at 94.

[55] 291 U.S. 82 (1934).

[56] *Id.* at 90-91.

[57] 319 U.S. 463 (1943).

[58] The statutory presumption specifically in issue was 15 U.S.C. § 902 (1963):
> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

[59] 319 U.S. at 467.

> connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[60]

The convenience argument was held to be valid only where the presumed fact bears a rational relation to the proven fact, where the defendant has more convenient access to the proof than the prosecution, and where requiring the defendant to go forward with the proof will not subject him to unfairness or hardship. The government argued further that Congress had the authority to create the same offense without the use of the presumption.[61] The Court overruled this theory, holding that the focus would be upon what Congress had done rather than upon what it had the power to do, reducing the status of the "comparative convenience" test from an alternative theory of justification to a corollary test which is reached only after a "rational connection" between the proven and presumed facts has been shown.[62]

What degree of probability is necessary in order to validate a statutory presumption? The "rational connection" test left the courts with a high degree of flexibility. In 1965, two cases were decided in which the provable facts were identical—the accused's presence at the site of an illegal still. In *United States v. Gainy*,[63] presence at an illegal still was held to bear a sufficient relation to "carrying on the business" of an illegal distiller to justify the presumption; but the same provable fact was held not to bear a sufficient connection to the offense of "possession" of an illegal still in *United States v. Romano*.[64] The two cases illustrate the function of the scope of the underlying offense as an important factor in determining the constitutionality of any given statutory presumption. In *Gainy* the underlying offense was interpreted very broadly to include aiding and abetting the illegal process,[65] while in

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[60] *Id.* at 467-68 (footnotes omitted).

[61] *Id.* at 472. The argument is based on the "greater includes the lesser" theory. *See* Ferry v. Ramsay, 277 U.S. 88 (1928).

[62] 319 U.S. at 472.

[63] 380 U.S. 63, 65 (1965).

[64] [P]resence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one . . . having nothing to do with possession.

382 U.S. 136, 141 (1965).

[65] "Those who aid and abet the enterpriser come within the statute's reach by virtue of 18 U.S.C. § 2 (1958 ed.)." 380 U.S. at 67.

Romano the possession offense was interpreted very narrowly.[66] The broader the scope of the underlying offense, the greater the likelihood that the presumption will bear the requisite connection necessary for a conviction.

In *Leary v. United States*,[67] the Court recognized that there might be a second constitutional standard applicable to criminal statutory presumptions but specifically refused to reach the question. Leary was tried and convicted of knowingly transporting and facilitating the transportation and concealment of marijuana which had been illegally imported or brought into the United States.[68] When possession of marijuana was established, knowledge that the marijuana had been illegally imported was presumed unless the defendant could explain his possession to the satisfaction of the jury.[69] Leary admitted acquiring the marijuana in New York, but testified that he did not know where the marijuana he acquired had been grown. The trial court instructed the jury that it might find petitioner guilty on either of two alternative theories: (1) That the marijuana had been brought back from Mexico into the United States and that with knowledge of that fact petitioner had continued to transport it; or (2) that petitioner had testified that he had transported the marijuana from New York to Texas and that the challenged presumption established the requisite knowledge of illegal importation.[70]

Although there was sufficient evidence to convict under the first

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[66] 382 U.S. at 140.

[67] 395 U.S. 6 (1968).

[68] Petitioner was also tried on two other counts: (1) That he knowingly smuggled marijuana into the United States in violation of 21 U.S.C. § 176a (1964); (2) that he was a transferee of marijuana and had knowingly transported, concealed, and facilitated the transportation and concealment of marijuana, without having paid the transfer tax imposed by Marijuana Tax Act, 26 U.S.C. § 4741 (1964), thereby violating 26 U.S.C. § 4744 (a)(2) (1964).

The jury found petitioner not guilty on count 1, and the conviction on count 2 was overturned as a violation of petitioner's fifth amendment right against self-incrimination. 395 U.S. at 11.

[69] 21 U.S.C. § 176(a) (1964) imposed criminal punishment upon every person who:

> knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law . . ., or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . .

A subsequent paragraph established the presumption.

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

[70] 395 U.S. at 30-31.

theory, the Court held when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside.[71]

The Court then delineated the criteria by which the constitutionality was to be judged:

> The upshot of *Tot*, *Gainy*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. . . .
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> . . . .
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> Since we find that the § 176a presumption is unconstitutional under this standard, we need not reach the question of whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use.[72]

In analyzing the constitutionality of the inference, the Court looked at the statute at face value asking whether it permitted conviction upon insufficient knowledge rather than whether Congress might have made mere possession a crime. After noting that congressional determination favoring the particular presumption must weigh heavily in the judicial assessment,[73] the Court looked for direct or circumstantial data regarding the beliefs of marijuana users about the source of the drug they consume.[74]

In *Turner v. United States*,[75] the Court invalidated certain presumptions using language which indicated that the higher standard, "beyond a reasonable doubt", was being applied. The Court, however, failed to articulate specifically that the higher standard had been

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[71] *Id.* at 31-32; *see* Stromberg v. California, 283 U.S. 359 (1931).

[72] 395 U.S. at 36 & n.64; *cf.* United States v. Adams, 293 F. Supp. 776, 783-84 (S.D.N.Y. 1968). *See also* United States v. Romano, 382 U.S. 136, 140-44 (1965); Comment, *The Unconstitutionality of Statutory Criminal Presumption*, 34 U. CHI. L. REV. 141 (1966).

[73] 395 U.S. at 36.

[74] In overturning the presumption the Court noted:

> Once it is established that a significant percentage of domestically consumed marijuana may not have been imported at all, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported. We conclude that in order to sustain the inference of knowledge we must find on the basis of the available materials that a majority of marijuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that their marijuana was grown abroad.

395 U.S. at 46-47.

[75] 396 U.S. 398 (1970).

adopted.[76] In *Turner*, the defendant was convicted for possession of heroin and cocaine. He was charged with receiving, concealing and facilitating the transportation and concealment of the heroin and cocaine while knowing that the drugs had been unlawfully imported into the United States.[77] The trial judge charged the jury in accord with the statute that "the jury could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew that the drugs" had been unlawfully imported.[78]

The Court affirmed Turner's conviction with respect to the heroin but reversed the cocaine conviction. It was considered beyond a reasonable doubt that heroin is not produced in the United States.

> [T]o possess heroin is to possess imported heroin. Whether judged by the more-likely-than-not standard applied in *Leary v. United States, supra*, or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.[79]

On the other hand, much more cocaine was found to be unlawfully produced in this country than is smuggled into it.[80]

> Applying the more-likely-than-not standard employed in *Leary, supra*, we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did.[81]

The defendant was also convicted of unlawfully purchasing, selling, dispensing, or distributing a narcotic drug not in or from the original package bearing tax stamps.[82] The absence of appropriate tax stamps constitutes prima facie evidence of a violation by the person in whose

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[76] There is some conflict among the commentators as to whether the higher standard was actually applied. *Compare* 68 Nw. U.L. Rev. 961, 966 (1973), *and* Christie & Pye, *Presumptions and Assumptions In the Criminal Law: Another View*, 1970 Duke L.J. 919, *with* 4 Suff. U.L. Rev. 929 (1970).

[77] 21 U.S.C. § 174 (1964).

[78] 396 U.S. at 402.

[79] *Id.* at 416. In reaching its decision, the Court relied upon the history of the application of the statute during which time the inference had never been successfully rebutted, as well as upon other data which showed almost no heroin was produced in the United States.

Here the Court's analysis differed from that in *Leary*. In *Leary*, after finding that most of the marijuana in this country was imported from Mexico, the Court focused upon the likelihood that the defendant knew the origin of the marijuana. In the instant case, the Court simply noted that those who sell and distribute heroin are in a "class apart" from the average juror or person and have regular contact with a drug which they know cannot be legally bought or sold.

[80] *Id.* at 418.

[81] *Id.* at 419.

[82] 26 U.S.C. § 4704(a) (1964).

possession the drugs were found. Although there was sufficient evidence to sustain a conviction for possession of heroin without the aid of the presumption,[83] the Court held there was no reasonable doubt that a possessor of heroin who had purchased it did not purchase it from a stamped package.[84] Since there was a "reasonable possibility" that the cocaine had been acquired from a stamped package, however, the presumption was determined to be invalid and the conviction was overturned as not based upon sufficient evidence.

In criminal convictions each element of the crime must be proved beyond a reasonable doubt.[85] It follows, therefore, that when an element of the crime is proved by relying upon a presumption, the degree of probability that the presumed fact exists should be beyond a reasonable doubt. Every criminal defendant must be presumed to be innocent of each element of the crime until proven guilty.[86] Only when it is found beyond a reasonable doubt that the presumed element of the crime exists can the burden of proof be shifted to the defendant to overcome the presumption of guilt.

III. Constitutional Limitations on Presumptions As Applied to the Felony-Murder Rule

The statutory felony-murder rule has been held by most state courts to embody a conclusive statutory presumption.[87] Some courts, however, hold that no presumption is involved.[88] As will be shown, the existence of the presumption may ultimately determine whether the felony-murder rule is constitutional. The statutory embodiment of the felony-murder rule is a legislative reflection of the common law.[89] "The antecedent common law pertaining to the subject with which a statute deals comprises part of its legal history."[90] Since there is no evidence of

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[83] 396 U.S. at 420. Two hundred and seventy-five glassine bags of heroin were seized. This was considered sufficient evidence to establish that Turner was distributing a narcotic drug not in the original package bearing tax stamps.

[84] The statutory inference could not be sustained insofar as it authorized an inference of dispensing or distributing. *Id.* at 421.

[85] *See, e.g.*, Thompson v. City of Louisville, 362 U.S. 199 (1960).

[86] *E.g.*, *In re* Winship, 397 U.S. 358 (1970).

[87] *E.g.*, People v. Ketchel, 71 Cal. 2d 635, 456 P.2d 660, 79 Cal. Rptr. 92 (1969); People v. Johnson, 28 Cal. App. 3d 653, 104 Cal. Rptr. 807 (4th Dist. Ct. App. 1972); People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (2d Dist. Ct. App. 1969), *cert. denied*, 400 U.S. 819 (1970); People v. Bufkin, 43 Mich. App. 585, 204 N.W.2d 762 (1972), *aff'd*, 48 Mich. App. 209, 210 N.W.2d 390 (1973); State v. Jewel, 473 S.W.2d 734 (Mo. 1971); State v. Kaufman, 183 Neb. 817, 164 N.W.2d 469 (1969); Commonwealth v. Yuknavich, 448 Pa. 502, 295 A.2d 290 (1972).

[88] *See* State v. Millette, 299 A.2d 150, 153 (N.H. 1972).

[89] *See* People v. Carlson, 37 Cal. App. 3d 349, 112 Cal. Rptr. 321 (1st Dist. Ct. App. 1974).

[90] 2A C. Sands, Statutes and Statutory Construction § 50.01, at 268 (1973).

any legislative intent to the contrary, the courts should look to the common law to determine whether the presumption exists. At common law the *mens rea* element necessary to elevate homicide to murder was presumed from the defendant's intent to commit the underlying felony.[91]

The felony-murder rule presumes different elements depending upon the underlying felony. The intent to take a life—premeditation—is presumed when the underlying felony is deemed by the legislature to involve a substantial certainty of creating life-endangering circumstances. The presumed premeditation supplies the necessary *mens rea* and the defendant is guilty of first degree murder.[92] Where the underlying felony is not designated by the statute, malice aforethought is presumed and the crime is elevated from manslaughter to murder.[93] The rule does not allow the court to look into the specific circumstances surrounding each case to determine whether the presumption is valid, nor is the defendant given a chance to show that he did not possess the requisite intent.[94] If the killing is found to have been committed during the perpetration of or attempt to perpetrate the underlying felony, the defendant has the requisite intent. The provable fact is a killing occurring during the perpetration of a felony in which the defendant was a willing participant.[95] If the defendant is found to have intended to commit the underlying felony, he is conclusively presumed to have intended the homicide.[96] Whether the homicide was premeditated or committed with malice aforethought is not an issue in the case.[97]

Long-standing judicial approval of the presumption provides strong indication that the presumption comports with due process.[98] The historical basis, however, is not in itself sufficient to establish the presumption's constitutionality.[99] As the applicable standard of constitutional scrutiny changes, the common law as embodied by statute must

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[91] *See* text accompanying notes 16 & 17 *supra*.

[92] *See, e.g.*, People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971); Adams v. State, 314 N.E.2d 53 (Ind. 1974); People v. Sparks, 53 Mich. App. 452, 220 N.W.2d 153 (1974); State v. Kaufman, 183 Neb. 817, 164 N.W.2d 469 (1969); Commonwealth v. Bowden, 454 Pa. 461, 309 A.2d 714 (1973).

[93] *See, e.g.*, People v. Ketchel, 71 Cal. 2d 635, 456 P.2d 660, 79 Cal. Rptr. 92 (1969); People v. Stamp, 2 Cal. App. 3d 288, 82 Cal. Rptr. 598 (2d Dist. Ct. App. 1970); State v. Shuler, 486 S.W.2d 505, (Mo. 1972); State v. Millette, 399 A.2d 150 (N.H. 1972).

[94] *See* text accompanying note 31 *supra*.

[95] *E.g.*, Alverey v. District Court, 525 P.2d 1131 (Colo. 1974).

[96] *See* note 31 *supra*.

[97] *See* note 32 *supra*.

[98] Barnes v. United States, 412 U.S. 837, 844 (1973).

[99] *Id. But see* Mosby v. State, 253 Ark. 904, 489 S.W.2d 799, 801 (1973) ("That statute [felony-murder rule] has been part of our law since 1838 and we have no intention of overruling it.").

be reevaluated in light of the evolving standard.[100]

The initial question becomes whether the standard applied in *Turner v. United States*[101] is applicable to the presumption embodied in the felony-murder rule. Several distinctions between the presumptions involved in the *Turner* line of cases and the presumptions embodied in the felony-murder rule seem readily apparent.[102] Upon closer analysis, however, the distinctions appear insignificant. The presumptions resulting in the evolution of the beyond-a-reasonable-doubt test were all rebuttable presumptions which were clearly articulated in the statutes. The felony-murder rule involves a conclusive presumption, and the presumption is not mentioned in the statute itself but is rather the underlying rationale which surfaces upon analysis by the courts.[103] Conclusive criminal presumptions have been subjected to the same constitutional analysis as their rebuttable counterparts.[104]

> If a legislative body is without the power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.[105]

Common law presumptions which evolve into statutes are subject to the same constitutional scrutiny as presumptions born in the legislature.[106] The presumption embodied in the felony-murder rule involves homicide, *malum in se*; while the presumption to which the *Leary* and *Turner* standards have been applied involved crimes which were *malum prohibitum*. This distinction has been used to circumvent constitutional scrutiny in the state courts.[107] The nature of the crime, however, bears no relationship to the probability that the inferred element truly exists. The same beyond-a-reasonable-doubt standard of proof is applicable in both cases. It would seem that a greater interrelation would be required to justify a presumption which would lead to capital punishment or life imprisonment than would be necessary to justify a presumption that leads to a much less severe punishment.

The intent necessary to bring the defendant within the ambit of the felony-murder rule is that he intended to perpetrate the underlying

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[100] *See* Barnes v. United States, 412 U.S. 837 (1973).

[101] 396 U.S. 398 (1969).

[102] *See* Gore v. Leeke, 284 S.C. 67, 199 S.E.2d 755 (1973), *holding* the *Turner* line of cases inapplicable.

[103] *See* cases cited note 92 *supra*.

[104] Heiner v. Donnan, 285 U.S. 312 (1932); Schlesinger v. Wisconsin, 270 U.S. 230 (1926).

[105] 285 U.S. at 329.

[106] Barnes v. United States, 412 U.S. 837 (1973).

[107] *See, e.g.*, Gore v. Leeke, 284 S.C. 67, 199 S.E.2d 755 (1973).

felony. Proof of the underlying intent bears little relationship to the likelihood that the killing was premeditated.[108] The courts cannot look to the power of the legislature to do away with *mens rea* altogether in making felony-murder murder in the first degree.[109] It should be noted that the Supreme Court has not overruled the comparative convenience test, but rather relegated it to a corollary.[110] The burden which is shifted to the defendant is an important factor in determining whether the presumption comports with due process.[111] Where a permissive inference is involved, the effect upon the defendant's burden is small, since neither the burden of going forward with the evidence nor the burden of persuasion has been shifted to the defendant.[112] Where a rebuttable presumption is involved and the burden of going forward with the evidence, but not the burden of persuasion, is shifted to the defendant, the state should be made to justify the presumption.[113] Where not only the burden of going forward, but also the burden of persuasion, is shifted to the defendant, the state should show an even greater degree of justification because the burden shifted to the defendant has been increased.[114] When a conclusive presumption is involved, the evidentiary burden shifted to the defendant is absolute; the defendant cannot overcome the presumption.[115] Therefore, when a conclusive presumption is operative, the state should have to prove there is no reasonable doubt that the presumed element in truth exists in every case. Where only 0.5 percent of robberies result in murder, is it beyond a reasonable doubt that the robber in every case intended to kill?[116]

IV. Other Possible Constitutional Limitations on the Felony-Murder Rule

Some state courts have adopted the view that there is no presumption involved in statutory felony murder.[117] The statutory scheme is

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[108] The likelihood that people will be placed in a situation in which death or serious bodily harm is likely to occur is an important factor to consider, but not in the context of determining the interrelationship between the presumed fact and the provable fact. It is based upon a criminal negligence or strict liability standard. *Mens rea* is not presumed; it is not an element.

[109] Tot v. United States, 319 U.S. 463, 469 (1943).

[110] *Id.* at 472.

[111] *See* text accompanying notes 29 & 30 *supra*. *Compare* Mobile J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910), *with* Western & A.R.R. v. Henderson, 279 U.S. 639 (1929).

[112] *See* text accompanying notes 38 & 39 *supra*.

[113] *See* text accompanying notes 32 through 34 *supra*.

[114] *See* text accompanying notes 35 through 38 *supra*.

[115] *See* text accompanying note 31 *supra*.

[116] M. Wolfgang, Patterns in Criminal Homicide 240-44 (1958), *as cited in* Model Penal Code § 201.2, Comment (Tent. Draft No. 9 1959).

[117] *See, e.g.*, Gore v. Leeke, 284 S.C. 67, 199 S.E.2d 755 (1973).

considered by these courts to be a valid exercise of the state's police power.[118] According to this rationale, the legislature is not creating a crime in which the requisite *mens rea* is presumed; the legislature is creating a new crime in which premeditation or malice aforethought is simply not an element. Liability for the death results not from the fact that the defendant intended to kill the victim, but because he had a different bad intention and was acting to carry out that bad intention.[119] The constitutional legality of the felony-murder rule under this theory is contingent upon the scope of the legislature's constitutional authority to do away with or alter *mens rea* as an element in a criminal offense. The basis for the requirement of *mens rea* before certain penalties may be imposed is ultimately based upon the eighth amendment prohibition against cruel and unusual punishment.[120] There is very little substantive case law involving cruel and unusual punishment and most of the cases with which the Supreme Court has dealt have been based upon the mode and manner of punishment imposed, rather than upon the interrelationship between the crime and the punishment adjudged.[121] The Supreme Court has never articulated a general constitutional doctrine of *mens rea*.[122] State courts have held that criminal intent is not essential where the legislature has so willed.[123] Generally, the courts have shown considerable deference to legislative judgment as to how severe the authorized penalty should be for specific classes of offenses; some courts have even taken the view that no sentence within the legislatively set limits could be considered cruel and unusual. While there are cases holding sentences invalid for being clearly out of proportion to the offense, often these decisions have been based upon state constitutional provisions expressly prohibiting disproportionate sentences.[124]

> The contention that an injury can amount to a crime only when inflicted by intention . . . [i]s as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[125]

When action willfully taken by a person places another in a situation

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[118] 48 W. VA. L.Q. 63, 64 (1942).

[119] W. LA FAVE & A. SCOTT, *supra* note 13, § 35, at 263.

[120] U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[121] Only one decision, Weems v. United States, 217 U.S. 349 (1910), comes close to the question of the interrelationship between the crime and the punishment.

[122] Powell v. Texas, 392 U.S. 514, 535 (1968).

[123] *See, e.g.*, State v. Labato, 7 N.J. 137, 149-50, 80 A.2d 617, 623 (1951).

[124] *See* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964).

[125] Morissette v. United States, 342 U.S. 246, 250 (1952).

in which death or injury is likely, the actor should be punished. The real difference between criminal negligence and intentional criminal conduct lies in the standard against which the conduct is measured—objective or subjective.[126]

The Supreme Court may be beginning to develop some notions of substantive due process concerning criminal legislation.[127] Capital punishment has recently been ruled unconstitutional when the imposition of the death sentence is discretionary.[128] The decision has resulted in an outgrowth of legislation whereby crimes punishable by either death or imprisonment are now automatically punishable by capital punishment.[129] The Supreme Court now has before it the question of whether the imposition of the death penalty for first degree murder constitutes cruel and unusual punishment.[130] If the Court rules that the death penalty is not cruel and unusual, then it will be left with the task of determining when the punishment may be applied. Clearly the harshest punishment should be imposed for the most reprehensible crimes, those in which the defendant has been shown to have willfully and deliberately caused death or severe physical harm to another. In cases in which the defendant is found guilty of first degree murder for which the penalty is automatically death, the state should be required to prove that the defendant had the requisite *mens rea*. When the felony-murder rule results in conviction for first degree murder without the defendant's intent to cause the homicide ever being in issue, the death penalty is out of proportion to the offense committed. "The [eighth] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[131]

There is presently no substantive limitation upon the legislatures' imposition of punishment for crimes which they create. The conflict between capital punishment and the eighth amendment, however, is certain to result in an outgrowth of substantive cruel and unusual punishment decisions which will more specifically delineate the role of subjective criminal intent as a constitutionally necessary element when the severest of society's penalties is automatically invoked. Until subjec-

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[126] Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401 (1971).

[127] *See* Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 66 (1961); Smith v. California, 361 U.S. 147 (1959); Lambert v. California, 355 U.S. 225 (1957). *See generally* Packer, *supra* note 124; Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.

[128] Furman v. Georgia, 408 U.S. 238 (1971).

[129] *See, e.g.*, MISS. CODE ANN. §§ 97-3-19, -21 (Supp. 1974) (felony-murder committed during the perpetration of certain felonies results in automatic death sentence).

[130] State v. Fowler, 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974).

[131] Trop v. Dallis, 356 U.S. 86, 101 (1958).

tive intent becomes a prerequisite to the imposition of some criminal sanctions, capital punishment and life imprisonment may be constitutionally imposed by legislation for crimes in which the subjective intent of the defendant is not an issue.

CONCLUSION

The basic flaw in the felony-murder rule is the application of an inflexible objective standard. The individual should be punished to the full extent of the law when it is shown that he as an individual intended to commit an act inherently harmful to society. He should not be condemned to death or imprisoned for life by a standard which is inflexible to different situations and different individuals. Only when the state proves that the individual intended to commit the act for which he is to be punished, should society punish the individual by death or mandatory life imprisonment. When state law punishes an individual by life imprisonment for a homicide which the prosecution has proven was premeditated, but automatically executes the same individual for a homicide in which premeditation is not an issue, the law should be changed.[132] It seems clear that the felony-murder rule convicts an individual by conclusively presuming premeditation and that the presumption is unconstitutional in light of the evolving standard applied in *Turner v. United States*.[133]

William Michael Beasley
Joe Price Coleman

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[132] *See* MISS. CODE ANN. §§ 97-3-19, -21 (Supp. 1974).
[133] 396 U.S. 398 (1970).

STUDENT RIGHTS AND DUE PROCESS: PROCEDURAL REQUIREMENTS OF *GOSS V. LOPEZ*

Between 1965 and 1972, expansion of the Bill of Rights interacted with burgeoning governmental power in a manner which irredeemably altered the relation between the public school and the student. The alteration was brought about in two steps: recognition of students as citizens enjoying full substantive and procedural rights and expansion of the concepts of liberty and property falling under the procedural protections of the due process clause.

Recently, in *Goss v. Lopez*,[1] the United States Supreme Court moved to tie up one of the last remaining threads in this altered relation: application of due process to "short-term" suspensions. Significant doubt remains, however, as to whether the procedures approved by the Court in *Goss* do in fact amount to meaningful due process.

This comment explores the development of student rights as affected by the changing concept of due process, compares the competing interests of student and school, and concludes that while the *Goss* procedure does not assure due process in all cases, relatively unburdensome procedures can be established to achieve this. For this reason, and in order to accord with direct precedent, *Goss* is best read not as imposing a particular procedure on all short-term suspension situations but only as requiring *some* due process protections to attend such suspensions, with specific procedures to be tailored to individual cases.

I. *Goss v. Lopez*

The controversy leading to *Goss v. Lopez* began during widespread racial unrest in the Columbus, Ohio, public schools during the spring of 1971. Plaintiff-appellees, alleged participants in demonstrations at various Columbus schools, were suspended from school for misconduct, under authority of an Ohio statute providing for suspensions of up to 10 days at the discretion of schools officials.[2] Neither the statute nor the guidelines adopted by the Columbus schools[3] required the suspending

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[1] 419 U.S. 565 (1975).

[2] Ohio Rev. Code Ann. § 3313.66 (1972), provided in part that "[t]he superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days." No appeal was provided for such suspensions. Goss v. Lopez, 419 U.S. 565, 567 (1975).

[3] Administrative Guide to the Columbus Public Schools § 1010.04 (1973): "Pupils may be suspended . . . from school in accordance with the provisions of § 3313.66 of the Revised Code," *quoted in* Lopez v. Williams, 372 F. Supp. 1279, 1282 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975).

official to give reasons for the suspension or to afford suspended students the opportunity to contest their suspension. Plaintiffs filed a class-action suit in the United States District Court for the Southern District of Ohio on behalf of themselves and all other students suspended under the statute during the demonstrations,[4] challenging the constitutionality of the statute and requesting a hearing by a three-judge court.[5] They contended that suspension, without minimal procedural safeguards of notice and hearing, violated the fourteenth amendment by compromising the students' protected right to an education without due process of law.[6] The students sought a declaration of the statute's unconstitutionality, an injunction against its enforcement, and expungement from school files of any reference to the suspensions. The three-judge court, after trial, found that education is a protected liberty for purposes of the due process clause of the fourteenth amendment; that suspensions, albeit brief, operated to impair that liberty, and that therefore suspensions of 10 days or less must be accompanied by the rudimentary procedural safeguards of effective notice and an informal fact-finding hearing.[7] The court held that the statute controverted the due process clause of the fourteenth amendment and ordered the defendants to delete all references to the suspensions from school records.[8] The United States Supreme Court voted 5-4 to affirm, designating education to be an interest protectable by the fourteenth amendment's due process clause from short-term suspension.[9] The Court announced that oral or written notice to the student followed by an informal consultation with the suspending official would serve as an adequate protective procedure.[10]

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[4] No official record was made of the number of suspensions during the demonstrations but testimony received at trial indicated that at least 75 students were excluded from public school for 10 days or less. *See* Lopez v. Williams, 372 F. Supp. 1279, 1282 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975).

[5] Plaintiffs asserted that the board had violated 42 U.S.C. § 1983 (1970). Lopez v. Williams, 372 F. Supp. 1279, 1281 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975). Plaintiffs also maintained that the statute was void for vagueness and overbreadth, because it failed to provide discernible standards for conduct which would lead to suspension. 372 F. Supp. at 1281. The court held that since the plaintiffs failed to show that the conduct for which they were suspended was entitled to first amendment protection, and since vagueness and overbreadth served exclusively as checks against governmental intrusions upon first amendment rights, the statute could not be struck down on these grounds. *Id.* at 1303.

[6] 372 F. Supp. at 1281.

[7] *Id.* at 1300-02.

[8] *Id.* at 1302.

[9] Goss v. Lopez, 419 U.S. 565, 581 (1975).

[10] *Id.* at 582.

II. The Growth of Student Rights

That action by a school district or its agent is "state action" under the fourteenth amendment is well established.[11] The protected "liberty" interests of the due process clause have long been construed to encompass a student's interest in obtaining an education.[12] Indeed, in light of the Supreme Court's statements concerning its importance,[13] the value of education to the student cannot be overemphasized. Clearly, to exclude the student from public school entails at least a temporary impairment of this admittedly vital interest. Nevertheless, courts traditionally have been reticent to exercise their powers in reviewing public school disciplinary powers. Early cases maintained that courts had no power to entertain student suits "except where fraud, corruption, oppression or gross injustice is palpably shown . . .";[14] that regulation of public

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[11] A state-supported institution is unquestionably an arm of the state, performing a public function, exercising discretion committed to it by the legislature, and regulating citizens affected by its activities by means of combined governmental functions. Public schools thus fall under the stricture of the fourteenth amendment: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV, § 1.

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the state itself and all of its creatures—Boards of Education not excepted. These have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

[12] *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (right to desegregated education protected by the due process clause of the fifth amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[13] Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Shelton v. Tucker, 364 U.S. 479, 487 (1960); McCollum v. Board of Educ., 333 U.S. 202, 212 (1948); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). At a minimum there is a strong correlation between years of schooling and level of income. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 319 (1971).

[14] Smith v. Board of Educ., 182 Ill. App. 342, 347 (1913).

education is reserved for state control;[15] that education is a privilege rather than a right;[16] or that the fourteenth amendment is inapplicable to the prerogative of a school to discipline its students.[17] More significantly, courts generally viewed the school as standing *in loco parentis* vis-a-vis its students. This "peculiar legal relationship"[18] is an extension of the concept of the state as *parens patriae*: the state is said to succeed to the duties of the parent whenever the parent is unable to attend to them.[19] The doctrine of *in loco parentis* arose in the United States as a defense in tort suits against teachers and other school officials accused of using excessive force against students in the administration of corporal punishment.[20] The rule is generally stated in terms of a limited

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[15] "The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts."

Waugh v. Board of Trustees, 237 U.S. 589, 596 (1915), *quoting* Board of Trustees v. Waugh, 105 Miss. 623, 635, 62 So. 827, 831 (1913). *But cf.* Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969): "No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. Power to punish and the rules defining the exercise of that power are not, however, identical."

[16] *Cf.* Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 262 (1934). *But see* Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961): "Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value . . . ." Due to compulsory education and school attendance laws, the right-privilege distinction, when deemed controlling, has generally been limited to the college student. *But cf.* Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718, 721 (1963) (participation in high school extracurricular activities held to be privilege "which may be claimed only in accordance with the standards set up for participation").

The United States Supreme Court has, however, abandoned the right-privilege distinction in recent years: "[T]his Court . . . has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972), *quoting* Graham v. Richardson, 403 U.S. 365, 374 (1971). *See generally* Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[17] State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943). *Contra*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[18] Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378, 385 (1969).

[19] *See* Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 79 N.W. 422, 428 (1899).

[20] *See generally* Annot., 43 A.L.R.2d 469 (1955). The antecedents of the American doctrine may be traced to Blackstone:

> He may also delegate part of his parental authority . . . to the tutor or schoolmaster, of his child; who is then *in loco parentis* . . . and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

privilege for teachers to take the place of the students' parents while the student is at school and who can therefore command obedience by reasonable physical punishment.[21] In time, the doctrine became the basis for granting school officials nearly unbridled discretion in regulating in-school student conduct and promulgating disciplinary rules.[22] Courts declined to intervene since they viewed the school as possessing "plenary parental power over pupils while they are in school."[23] Fundamental differences exist between the teacher-student relation and the parent-child relationship, however, which militate against suggesting that school officials act as surrogate parents in exercising disciplinary powers:

> In the modern school setting, the teacher does not and perhaps cannot have an individual, parent-like concern for the child's welfare. A close home-school community . . . trust rarely develops. . . . The case for broad discretionary school power seems especially weak when differences in race and social class underline the impersonal aspects of the student's relationship with school authorities.[24]

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1 W. BLACKSTONE, COMMENTARIES *453. *See* Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1367-72 (1963).

[21] *See, e.g.*, Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954); Holmes v. State, 39 So. 569 (Ala. 1905); Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944). The theory is recognized in the *Restatement*:

> One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, *notwithstanding the parent's prohibitions or wishes.*

RESTATEMENT (SECOND) OF TORTS § 153(2) (1965) (emphasis added). At least one state, New Jersey, has abolished the use of corporal punishment in its schools. *See* N.J. STAT. ANN. § 18A:6-1 (1968).

[22] The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management, and control of such school as they may think proper . . . . They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it . . . . For offenses committed by the scholar while at school he is amenable to the laws of the school . . . .

Hobbs v. Germany, 94 Miss. 469, 477-78, 49 So. 515, 517 (1909), *quoting* Dritt v. Snodgrass, 66 Mo. 286, 296-97 (1877) (Norton, J., concurring); *cf.* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 524-25 (1969) (Black, J., dissenting): "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."

[23] Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 377 (1969). *But cf.* Kent v. United States, 383 U.S. 541, 555 (1966). "[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."

[24] Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 560-61 (1971):

Cases which impose the legal fiction that the school's authority is expressly delegated by the parent[25] seem particularly ill-reasoned when viewed in light of generally enacted compulsory attendance laws,[26] which abrogate the consensual relation between parents and school officials by placing the parents under a duty to send their child to school.[27] Additionally, the broad scope of disciplinary rules and the necessary impersonality of enforcing those rules in large public schools, with the concomitant insensitivity to individual concerns, suggest that not all parents would agree to the sanctions which flow from the violation of rules or even with the rules themselves.[28] It was not until 1961, in *Dixon v. Alabama State Board of Education*,[29] that "the Constitution was first brought to the campus."[30] In *Dixon*, the United States Court of Appeals for the Fifth Circuit held that "due process requires notice and some opportunity for hearing before a student . . . is expelled for misconduct"[31] from a public college. The hearing must be held prior to the expulsion and must involve "the rudiments of an adversary proceeding."[32] The Fifth Circuit recognized the students' paramount interest in

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> When the sanction in question is exclusion from school, the doctrine . . . seems a peculiarly inappropriate justification [for judicial inaction]. Parents cannot take disciplinary action parallel to excluding a student from school, for they generally have a state-imposed duty to support and care for their children.

Id. at 561.

[25] *See, e.g.*, Wisconsin Indus. School for Girls v. Clark County, 103 Wis. 651, 79 N.W. 422 (1899).

[26] Despite the serious deprivation of liberty involved, compulsory attendance laws have generally been held constitutional on the theory that the deprivation is a reasonable means of achieving a legitimate state interest. *See, e.g.*, State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929); Stephens v. Bogart, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950). *But cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[27] "[W]hen a parent sends a child to school because the law so directs, he delegates no power." Buss, *supra* note 24, at 560.

[28] *See* Goldstein, *supra* note 23, at 379.

[29] 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), *noted in* 50 GEO. L.J. 314 (1961); 75 HARV. L. REV. 1429 (1961); 60 MICH. L. REV. 499 (1962); 15 VAND. L. REV. 1005 (1962).

[30] Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1059 (1969).

[31] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). The plaintiffs were expelled from an all-black college by the Alabama State Board of Education for participating in a sit-in at a segregated lunch counter. The Fifth Circuit reasoned that a hearing was required because "a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses." 294 F.2d at 158-59. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 702 (1958).

[32] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). The "rudiments" included notice of charges, names of witnesses, the facts to which the witnesses would testify, opportunity to present a defense to the charges

obtaining an education[33] and rejected the board's *in loco parentis* argument: "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."[34] At first, other courts were slow to follow the *Dixon* holding, clinging to the idea that they "should not usurp" the functions of school administrators.[35] Gradually, however, the lower federal courts recognized the public college student's right to due process prior to expulsions or suspensions of substantial duration.[36]

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through either affidavits or oral testimony by witnesses, and access to a written report of the tribunal's conclusions. The Fifth Circuit specifically stated that the state need not provide the student an opportunity to cross-examine adverse witnesses. 294 F.2d at 159.

[33] [E]ducation is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

294 F.2d at 157.

[34] *Id.* at 155. *See generally* Note, *supra* note 20; 15 VAND. L. REV. 1005 (1962). Although the *Dixon* court stopped short of doing so, at least three jurisdictions have expressly abandoned *in loco parentis* as it applies to college campuses. *See, e.g.*, Moore v. Student Affairs Comm., 284 F. Supp. 725, 729 (M.D. Ala. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1st Dist. Ct. App. 1967).

[35] Madera v. Board of Educ., 386 F.2d 778, 784 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

[36] The cases generally hold that public college expulsion or suspension hearings must be conducted pursuant to procedures which allow the student to come personally before the decision maker. They differ on what procedural safeguards must be provided, and when and where the hearing must be held. *Compare* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (cadet must be given a fair hearing before expulsion from the Merchant Marine Academy); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416 (W.D. Wis. 1969) (absent danger to persons or property all suspensions must be preceded by specification of charges, notice of hearing, and hearing), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970); Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967) (suspended students entitled to notice, pre-hearing inspection of evidence, advice of counsel, hearing, written findings, and recordings of proceedings at own expense); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963) (students entitled to notice and hearing before expulsion but not to record of proceedings); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961) (students entitled to notice and hearing before expulsion for "personal misconduct"), *with* Norton v. Discipline Comm., 419 F.2d 195, 200 (6th Cir. 1969) (full hearing in district court *after* suspension renders moot contention that school authorities denied due process); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 753 (W.D. La. 1968) (due process satisfied where hearing conducted over 100 miles from campus, despite fact that students contended the trip constituted economic hardship and only 14 of 26 were present at the hearing).

Relations between a student and a private institution are generally a matter of contract. Usually these institutions reserve the right to dismiss students at any time for any reason without divulging the reason. *See, e.g.*, Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Robinson v. University of Miami, 100 So. 2d 442 (Fla. 3d Dist. Ct. App. 1958) (private university may

The college cases appear heavily influenced by the potential value of a college education.[37] Below the college level, however, the courts have been slower to apply *Dixon*. *Dixon* was reluctantly extended to expulsions from public secondary schools[38] and to suspensions for lengthy periods.[39] Most of the opinions, in determining whether school officials must afford students a hearing prior to suspension, attempted to measure the harm flowing from the suspension by the amount of school the student would miss, on the theory that harm increases as the exclusion grows longer.[40] Consequently differences arose as to the proper amount of time a suspension must last in order to constitute a "justiciable penalty."[41] This approach has been invalidated by the interests-balancing step of *Goldberg v. Kelly*,[42] discussed below, which allows weighing of competing interests only in determining the complexity of

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compel student to withdraw at any time so long as it reserves the right and acts in good faith); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928) (students waived right to hearing in contract with university). *But cf.* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd in part and rev'd in part sub nom.*, McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) (en banc) (42 U.S.C. § 1981 (1970) prohibits private schools from denying admission to qualified black applicants solely on the basis of their race). *See generally* 45 MISS. L.J. 246 (1974).

[37] *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Soglin v. Kauffman, 295 F. Supp. 978, 988-90 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

[38] *See* Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); DeJesus v. Pendarthy, 344 F. Supp. 70 (D. Conn. 1972); Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex.), *enforced*, 333 F. Supp. 1328 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir. 1973); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

[39] *See, e.g.*, Pervis v. LaMarque Indus. School Dist., 466 F.2d 1054 (5th Cir. 1972) (due process requires that student suspended for 3 months be afforded prior hearing; valid hearing subsequent to suspension does not satisfy due process); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971). *Williams* involved a 30-day suspension added to a 10-day suspension without a prior hearing. The court stated:

> [A] penalty of this magnitude ought not be imposed without proper notice of the charges, and at least an attempt to ascertain accurately the facts involved and to give the student an opportunity to present his side of the case.

Id. at 301-02.

[40] This theory has been questioned by at least one court, which stated that "a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no 'make-up.'" Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 n.4 (5th Cir. 1972).

[41] *Compare* Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972) (question and answer period *subsequent* to 5-day suspension held to satisfy due process), *and* Hernandez v. School Dist. No. One, 315 F. Supp. 289 (D. Colo. 1970) (upheld constitutionality of statute permitting suspensions of up to 25 days without prior hearing), *with* Mills v. Board of Educ., 348 F. Supp. 866, 878, 880-83 (D.D.C. 1972) (suspensions of 2 days or longer must be preceded by extensive due process hearing including right to counsel and cross-examination of adverse witnesses).

[42] 397 U.S. 254 (1970), *noted in The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 100 (1970); 23 U. FLA. L. REV. 422 (1971).

attendant due process protections, not in determining whether such protections should attach.[43]

Today the doctrine of *in loco parentis* is nearly defunct.[44] The Supreme Court has recognized that the fourteenth amendment, with all of its ramifications, follows the student to school.[45] Students' substantive rights, however, like those of adults, are subject to curtailment when they conflict with substantial state interests.[46] The courts' treatment of the interest of the state in maintaining an environment[47] conducive to education within the school has substantially replaced *in loco parentis* as an effective check on all but the most fundamental substantive student rights.[48] Most importantly for present purposes, however, the advent of substantive rights for students was accompanied by the advent

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[43] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972); Bell v. Burson, 402 U.S. 535, 539-42 (1971); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

[44] *See, e.g.*, Frels, *Search and Seizure in the Public Schools*, 11 HOUSTON L. REV. 876, 879 (1974); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 292 (1968); Yudof, *Student Discipline in Texas Schools*, 3 J. LAW & EDUC. 221, 224-25 (1974) (noting Texas as an exception to the general rejection of *in loco parentis*).

[45] "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re* Gault, 387 U.S. 1, 13 (1967). "[I]t can hardly be argued that students . . . shed their constitutional rights . . . at the schoolhouse gate." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969); *see, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Van Alstyne, *supra* note 44, at 293-94; Yudof, *supra* note 44, at 222; 27 VAND. L. REV. 372, 378 (1974).

[46] *See* Frels, *supra* note 44, at 877 and cases cited therein.

[47] "Underpinning any determination of 'reasonableness' should be the strong public policy to provide an education to all citizens . . . ." McClung, *The Problem of the Due Process Exclusion*, 3 J. LAW. & EDUC. 491, 494 (1974); *see* Goss v. Lopez, 419 U.S. 565, 584 (1975) (Powell, J., dissenting); Ladd, *Civil Liberties for Students—At What Age?*, 3 J. LAW & EDUC. 251, 251-52 (1974).

[48] *See, e.g.*, Buss, *supra* note 24, at 549, 552, 558; Ladd, *supra* note 47, at 252; McClung, *supra* note 47, at 492. The tight rein on substantive student rights arises from a perception of students as immature, justifying relatively stringent state controls in order to accomplish legitimate state interests, including education. *See* Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir. 1970); Robinson v. Sacramento City Uniform School Dist., 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (3d Dist. Ct. App. 1966); Passel v. Fort Worth Indep. School Dist., 453 S.W.2d 888, 892 (Tex. Civ. App. 1970). "The state has the power to regulate the activities of children in a wider range of circumstances [than adults] when considering the application of school rules." Frels, *supra* note 44, at 877.

This extrapolation of physical immaturity into constitutionality under the auspices of behavioral control has been criticized. *See* Ladd, *supra* note 47, at 256, noting that stare decisis has calcified Anglo-Saxon notions of children's roles relative to parents and institutions (e.g., characterizing a 17-year-old as an "infant"). Further, Professor Ladd notes: "[t]he psychological research suggests . . . that when there is intelligent, stimulating adult companionship at hand . . . all the disorder that goes with real freedom are [*sic*] actually conducive to learning." *Id.* at 258.

of procedural means of vindication of those rights[49]—means which could be used to vindicate other nonconstitutional, protectable interests.

III. The "New Property"

During the period of growth of recognition of student rights and protections, a related concept was evolving: the Supreme Court was accepting a substantially expanded concept of protectable interests. In 1964, Professor Charles Reich diagnosed the need for extension of due process protections to certain quasi-property interests.[50] Professor Reich noted the rapid expansion of government possession and distribution of wealth and the means to acquire it. The American people were becoming increasingly dependent upon governmental distributions of property and services and increasingly less dependent upon more traditional forms of property. The receipt of these benefits had been traditionally characterized as a privilege rather than a right and governmental manipulation or revocation of the benefits was being allowed without attendant due process.[51] At times this manipulation extended to the exactment of conditions, including relinquishment of one's constitutional rights, to assure continued distribution.[52] Professor Reich concluded that since government distributions were rapidly displacing tra-

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[49] Procedural safeguards have been extended to students in a "modern line of cases" beginning with Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). McClung, *supra* note 47, at 492. *See, e.g., In re* Gault, 387 U.S. 1, 28 (1967) ("Under our constitution, the condition of being a boy does not justify a kangaroo court."). As is indicated at note 36 *supra*, this development applies chiefly to public institutions.

[50] *See* Reich, *The New Property*, 73 Yale L.J. 733 (1964).

[51] Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965); Reich, *supra* note 50, at 740; *see, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517 (1892).

The right-privilege distinction is one of the most prominent of several justifications for governmental manipulation of certain private rights without attendant due process. Others, including the doctrines of "gratuity," "the whole and the parts," and internal management are discussed in Reich, *supra* note 50, at 740. Prosessor Reich likens this situation to "the philosophy of feudal tenure. Wealth is not 'owned,' or 'vested' in the holders . . . [but] . . . held conditionally . . . to ensure the fulfillment of obligations imposed by the state." *Id.* at 769. *See generally* Van Alstyne, *supra* note 16.

[52] The policy of the [Communications Licensing] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses . . . need not be renewed.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). "Although the denial of benefits is consistently held not to be penal in nature, it is perfectly clear that on occasion the government uses this power as a sanction." Reich, *supra* note 50, at 755; *cf.* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 Harv. L. Rev. 880, 880-81 (1973).

ditional forms of property, to allow unfettered manipulation was to allow government to circumvent the property-oriented protections of the Bill of Rights.[53] In short, if government largess were in many cases to perform the functions of more traditional forms of property,[54] then the constitutional system demanded that it be treated procedurally[55] as though it *were* more traditional property.[56] Otherwise the protections of our property-oriented constitution could be circumvented.[57]

In 1970, in *Goldberg v. Kelly*,[58] the Supreme Court arrived at substantially the same conclusion.[59] Mrs. Goldberg's welfare payments, on which she totally depended, were reduced without notice or hearing. Noting that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity,'"[60] the Court stated that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."[61]

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[53] [I]n the final analysis the Bill of Rights depends upon the existence of private property . . . .

. . . .

The aim of these benefits is to preserve the self-sufficiency of the individual . . . and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.

Reich, *supra* note 50, at 771, 785-86 (citations omitted).

[54] *See id.* at 779.

[55] The Supreme Court adopted the benefits-property analogy in Goldberg v. Kelly, 397 U.S. 244 (1970). *See* note 59 *infra*. *Goldberg*, however, did not explicitly extend the analogy beyond procedural due process into substantive due process; in the latter area the old distinctions appear to be retained. *See* Richardson v. Belcher, 404 U.S. 78, 80 (1971), *citing* Flemming v. Nestor, 363 U.S. 603 (1960) (benefits may be reduced if a rational basis exists).

[56] Regarding more traditional forms, see Greene v. McElroy, 360 U.S. 474 (1959); Morgan v. United States, 304 U.S. 1 (1938); Southern Ry. v. Virginia, 290 U.S. 190 (1933).

[57] The problem may be exacerbated by the relative inability of some classes of recipients to act to vindicate their interests, *e.g.*, because of ignorance or of inability to retain counsel. *Cf.* Reich, *supra* note 51, at 1246.

[58] 397 U.S. 254 (1970), *noted in The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 100 (1970); 16 VILL. L. REV. 587 (1971).

[59] *Goldberg* is generally regarded as the watershed case, but the idea of protecting interests other than ones in traditional property was not new. *See, e.g., In re* Buffalo, 390 U.S. 544 (1968) (due process in disbarment proceedings); Armstrong v. Manzo, 380 U.S. 545 (1965) (custody of child); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (admission to bar); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (designation of organization as communist); Garfield v. Goldsby, 211 U.S. 249 (1908) (government benefits restored to American Indian).

[60] Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

[61] *Id.*

In this vein, the Court concluded that certain quasi-property interests must be accorded protections similar to those accorded the more traditional forms of property.[62] To implement these protections the asserted interest must be capable of characterization as "protected," the process to which each person is due being dependent upon a balancing of the protected interest in question against opposed government interests such as efficiency or the need for summary adjudication.[63]

As receipt of welfare benefits was "the very means by which to live,"[64] Mrs. Goldberg was entitled to a full-dress, oral evidentiary hearing. Beyond this specific finding, however, the opinion failed to provide useful guidelines regarding which interests could be characterized as protected. In 1972 the Court, in *Board of Regents v. Roth*,[65] issued what have been taken to be definitive guidelines for making this determination.

The *Roth* formulation sets forth those government entitlements which fall "within the Fourteenth Amendment's protection of liberty and property."[66] Both terms are to be construed liberally: "[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money,"[67] and "deprivations of liberty [are protected] beyond the sort of formal constraints imposed by the criminal process."[68] These liberties, the Court noted, include the right "'to acquire useful knowledge'"[69] and to protect one's "good name, reputation, honor, or integrity . . . .'"[70] Property interests, the Court ruled, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[71] The claimant must have more than an "abstract need or . . . unilateral expectation"[72] of the entitlement; he must "have a legitimate claim of entitlement to it."[73]

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[62] *Id.* at 262.

[63] *Id.* at 263. *See* Fuentes v. Shevin, 407 U.S. 88, 88-89 (1972); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

[64] 397 U.S. at 264. *See* Note, *supra* note 52, at 889 (*Goldberg* hearing tantamount to trial).

[65] 408 U.S. 564 (1972), *noted in* 73 COLUM. L. REV. 882 (1973); 48 IND. L.J. 127 (1972); 38 Mo. L. REV. 279 (1973).

[66] 408 U.S. at 571.

[67] *Id.* at 571-72.

[68] *Id.* at 572.

[69] *Id.*, *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[70] 408 U.S. at 573, *quoting* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[71] 408 U.S. at 577.

[72] *Id.*

[73] *Id.*

Thus, a legitimate claim of entitlement to government largess or services is a protectable property interest.[74] This claim would most often be defined by specific statutory qualifications;[75] however, "the source [of entitlement] need not be explicit but can be implicit in the overall workings of a governmental program."[76]

Since *Roth* the courts have identified a wide variety of interests as protectable.[77] Once any interest is so characterized, due process must be accorded before the interest can be encroached upon by governmental action.[78] What form the protection will take is determined in each case

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[74] *See* text accompanying note 66 *supra*. Judicial enlargement of the scope of the fourteenth amendment has prompted the comment that "substantive due process certainly has not died; it has simply been shifted from the area of property rights into that of personal rights." McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review*?, 52 TEXAS L. REV. 1257, 1299 (1974).

[75] In Mrs. Goldberg's case, for example, statutory qualification for welfare benefits constituted a protectable property interest. *Cf.* note 77 *infra*.

[76] Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 489 (9th Cir. 1974), *citing* Perry v. Sindermann, 408 U.S. 593, 601 (1972), *and* Morrissey v. Brewer, 408 U.S. 471, 479, 481-82 (1972).

[77] *E.g., prisoner's "good time" credits*—Wolff v. McDonnell, 418 U.S. 539 (1974); *receipt of mail by prisoner*—Procunier v. Martinez, 416 U.S. 396 (1974); *suspended sentence*—Gagnon v. Scarpelli, 411 U.S. 778 (1973); *parole*—Morrissey v. Brewer, 408 U.S. 471 (1972); *child custody*—Stanley v. Illinois, 405 U.S. 645 (1972); *driver's license*—Bell v. Burson, 402 U.S. 535 (1971); *reputation*—Wisconsin v. Constantineau, 400 U.S. 433 (1971); *federally subsidized housing—e.g.*, Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 488-90 (9th Cir. 1974); *disability benefits*—Gaffney v. Silk, 488 F.2d 1248, 1250 (1st Cir. 1973).

Government employment may be protected if the employee can show some legitimate expectation of continuation or reemployment. *E.g., tenure*—Collins v. Wolfson, 498 F.2d 1100, 1103-04 (5th Cir. 1974) (Where tenured and non-tenured teachers were dismissed for the same reason, only the tenured teacher had a protectable interest.); *general practices of the institution*—Cardinale v. Washington Tech. Inst., 500 F.2d 791, 793-94 (D.C. Cir. 1974) (non-tenured person who was senior in department protected); Zimmerer v. Spencer, 485 F.2d 176, 178 (5th Cir. 1973); *teaching certificate*—Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016, 1019 (4th Cir. 1974); in addition, government employment is a protectable interest where regulations have been promulgated specifically to protect against arbitrary dismissal. Young v. United States, 498 F.2d 1211, 1221 (5th Cir. 1974).

Despite lack of such an expectation of employment, the employee's interest may be protectable if some additional substantive right is implicated. *E.g., reputation*—Lombard v. Board of Educ., 502 F.2d 631, 637 (2d Cir. 1974); McNeil v. Butz, 480 F.2d 314, 318-20 (4th Cir. 1973); *"liberty" not related to employment expectation*—Wellner v. Minnesota State Junior College Bd., 487 F.2d 153, 156 (8th Cir. 1973); Hostrop v. Board of Junior College Dist. No. 515, 471 F.2d 488, 495 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

The following interests, among others, have been found to be unprotected: *patronage employment*—Nunnery v. Barber, 503 F.2d 1349, 1359 (4th Cir. 1974); Adams v. Walker, 492 F.2d 1003, 1006-07 (7th Cir. 1974); *probationary employment*—Ring v. Schlesinger, 502 F.2d 479, 485-87 (D.C. Cir. 1974); *government employment without contract or fixed term of employment*—Abeyta v. Town of Taos, 499 F.2d 323, 327 (10th Cir. 1974); *right*

by a balancing of competing interests—the second step required by *Goldberg*.

IV. Applying *Goldberg-Roth* to Public Schools

Following the promulgation of the *Goldberg-Roth* formulation, public school attendance has come generally to be considered a protectable interest, a form of the "new property."[79] That the doctrine, in its application to school discipline, is not fully developed is reflected in the ambivalence in the cases. Prior to *Goss*, "short-term" suspensions had been frequently denied protected status;[80] determining which suspensions qualified as short-term (usually either 7 or 10 days and shorter) was predictably an arbitrary decision.[81] Since any suspension, no matter what its duration, is an infringement upon a protected interest, *Goldberg* and *Roth* clearly command that due process attend its imposition. Duration of the suspension enters the formula as a factor not of protectability but only of the balancing of interests when determining what form due process must take.

A. Protectability

The first step in applying *Goldberg* and *Roth* to public school suspensions is a determination of whether students have a legitimate "claim of entitlement"[82] to schooling, the deprivation of which invokes due process protections. State compulsory education laws would appear to be the strongest evidence of such a claim.[83] Actual codification is not

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to continued employment in armed services—Sims v. Fox, 505 F.2d 857 (5th Cir. 1974).

It has been held that an employee with a protectable interest can waive due process —Field v. Boyle, 503 F.2d 774, 778 (7th Cir. 1974); *cf.* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

[78] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 483-90 (1972).

[79] "[T]here must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). "[The foregoing] statement could not have been made had the students not held a property-like interest in their education . . . ." McCormack, *supra* note 74, at 1288; *see id.* at 1287.

[80] *See, e.g.*, Dunn v. Tyler Indep. School Dist., 460 F.2d 137 (5th Cir. 1972); Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988, *aff'd per curiam*, 450 F.2d 1103 (5th Cir. 1971).

[81] The following cases are indicative of the diversity of opinion as to what constituted a "short-term" suspension: Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972) (7 days); Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971) (10 days); Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971) (5 days).

[82] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[83] "The provisions for public education found in almost all state constitutions and the compulsory education laws are the strongest indicators [of a protectable interest]." McClung, *supra* note 47, at 494 n.11, *citing* Brown v. Board of Educ., 347 U.S. 483, 493

necessary, however. The Supreme Court made clear in *Perry v. Sindermann*[84] that a governmental course of conduct creating clearly defined and reliable expectations may give rise to a protectable interest in continuation of the conduct. *Roth* noted that "rules *or understandings* [could] support claims of entitlement."[85] At the least a state which holds out a service to its citizens must provide it to all in a manner commensurate with equal protection.[86] Further, *Roth* specifically designated acquisition of "useful knowledge" as a protectable interest.[87] Schooling per se is not the only protectable interest implicated by suspension: The student's good name and reputation are protectable,[88] as is his interest in his future capability to make his way in the world.[89]

For these reasons[90] schooling is to be preserved by the dictates of due process from arbitrary termination through expulsion[91] or long-term

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(1954); *see* Flygare, *Short-Term Student Suspensions and the Requirements of Due Process*, 3 J. Law & Educ. 529, 537 (1974).

[84] 408 U.S. 593 (1972), *noted in* 48 Ind. L.J. 127 (1972); *and* 38 Mo. L. Rev. 279 (1973); *see* Note, *supra* note 52, at 890-91.

[85] Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added).

[86] Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see* McClung, *supra* note 47, at 494 n.12.

[87] 408 U.S. at 572, *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[88] 408 U.S. at 573, *citing* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[89] 408 U.S. at 573 (standing in community). "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). "[S]uspension always involves a permanent notation on the student's record which may have long term effects on his ability to achieve entry into college or the job market." Abbott, *supra* note 18, at 382; *see* Hatter v. Los Angeles City High School Dist., 452 F.2d 673, 674 (9th Cir. 1971) (evidence of disciplinary action in student's record may prejudice opportunity for college admission and future employment); Vail v. Board of Educ., 354 F. Supp. 592, 603 n.4 (D.N.H.) ("record of the suspension may jeopardize future employment and educational opportunities"), *vacated and remanded*, 502 F.2d 1159 (1st Cir. 1973).

[90] One court has noted a further reason in observing: "No authority is needed for the fundamental American principle that a public school education through high school is a basic right of all citizens." Cook v. Edwards, 341 F. Supp. 307, 310-11 (D.N.H. 1972).

[91] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). The argument has been forcefully made that the right to a public education attaches more securely to the more fundamentally important secondary education than to college, so that the *Dixon* precedent should apply even more forcefully to secondary students than to college students. Buss, *supra* note 24, at 554, *citing* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

Further, secondary school students usually attend school under compulsion of law. Since college attendance is optional, the case would appear to be stronger for requiring procedural protections to secondary school students. Compulsory attendance statutes involve a legislative judgment that a certain amount of education is necessary to satisfactory functioning in society. Since these statutes represent a legislative judgment that a school-age child should be in school, school authorities should take utmost care before suspending the child and, thereby, overriding the legislative judgment.

suspension.[92] Once this determination is made, *any* curtailment of schooling, regardless of its duration, must be accompanied by due process.[93] This however, has not uniformly been the case. Short-term suspensions have been excepted,[94] at least partly on the ground that they are not sufficiently important to qualify as deprivation of a protectable interest. This justification clearly will not suffice under *Goldberg* and *Roth*: Once protected, an interest falls under the aegis of the fourteenth amendment. The weight of the student's interest, expressed in terms of harm accruing from the relative length of suspension, is relevant only in determining the form due process must take. A second frequently advanced justification for excepting short-term suspensions from the operation of due process is that the student's interest in a very short suspension, although protectable, is de minimis relative to the school's competing interests—efficacious disciplinary standards and preventing the dilution of administrative resources.[95] In effect, the student's interest is said to be so heavily outweighed by the school's competing interests that the required due process protection declines to zero.

Informed opinion, however, disputes the de minimis conclusion,[96] largely because the apparent harm occasioned by a suspension, whatever its length, is considerably magnified by the importance of schooling[97] not only in educating and training the student to compete for his living[98] but also in equipping the student to deal with his social environment.[99] Academically, even the shortest suspension may be substantially damaging. For example, failing grades may be given to students

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[92] *E.g.*, Hatch v. Goerke, 502 F.2d 1189, 1192 (10th Cir. 1974).

[93] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972); Bell v. Burson, 402 U.S. 535, 539-42 (1971); Richardson v. Perales, 402 U.S. 389, 401-07 (1971); Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

[94] See notes 80 & 81 and accompanying text *supra*.

[95] "[I]n these school discipline cases, the nature of the sanction affects the validity of the procedure used in imposing it." Farrell v. Joel, 437 F.2d 160, 161 (2d Cir. 1971) ("nature" of a 10-day suspension held not to warrant notice and hearing); *see, e.g.*, Linwood v. Board of Educ., 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D.N.Y. 1971).

[96] Buss, *supra* note 24, at 550. *See generally* Flygare, *supra* note 83.

[97] [E]ducation is the great equalizer in the United States, the port of entry to wealth, status, and the good life. Education is the foundation of democracy, the *sine qua non* for a literate and enlightened electorate." Buss, *supra* note 24, at 547.

"[I]t is now evident that expulsion or exclusion from college may . . . disadvantage an individual at least as much as a single infraction of a criminal statute," hence protections should be similar. Van Alstyne, *supra* note 44, at 296.

[98] *See* note 89 *supra*.

[99] *See, e.g.*, *In re* Gault, 387 U.S. 1, 26 (1967); Lopez v. Williams, 372 F. Supp. 1279, 1299 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975).

for work missed during suspension absences;[100] the habit of attendance, preparation, attention, and learning may be broken;[101] and a series of short-term suspensions may have the same net effect as a single longer one.[102]

The attendant social harm may be even greater. Appearance of suspensions on academic records or informal knowledge of suspensions could lead future teachers, prospective employers, and others to reach damaging conclusions regarding the student.[103] The suspended student's image among his peers could be altered, encouraging disenchantment with the school environment and enhancement of street values.[104] The students' perception of an administration which summarily suspends its students could deteriorate, damaging the students' perception of authority groups and the justice-dispensing system generally.[105]

Finally, the number of students subjected to this deprivation underscores the seriousness of the total potential deprivation. During the 1972-1973 school year, the New York City schools suspended 19,518 pupils; the Houston schools, 9,150; the Miami schools, 6,812; and the Cleveland schools, 11,634 pupils.[106] In Memphis the number of suspensions increased from 4,693 in 1967-1968, to 7,298 in 1973-1974.[109] A study of a five-state area indicated that 10 percent of all secondary school students were suspended at least once during 1972-1973.[108] Absentee

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[100] *See* Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975); Vail v. Board of Educ., 354 F. Supp. 592 (D.N.H.), *vacated and remanded*, 502 F.2d 1159 (1st Cir. 1973).

[101] *See* Lopez v. Williams, 372 F. Supp. 1279, 1299 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975).

[102] Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971).

[103] For example, school records may be reviewed in juvenile court adjudications. *See In re* Wilson, 438 Pa. 425, 264 A.2d 614 (1970). Further, the "Pygmalion" effect, or self-fulfilling prophecy, according to which a student performs only as well as his teachers are prepared from their prior knowledge to expect him to do, is well-documented. *See* Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1157 n.9 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir. 1973). *See generally* J. Holt, How Children Fail 1 (1964); C. Silberman, Crisis in The Classroom 138 (2d ed. 1970).

[104] "[B]ecause of the dominant role of schools in the United States, a child's sense of 'identity' with his society may be impaired, possibly imperiling his mental and emotional growth, if he is estranged from the schools and the students . . . ." Buss, *supra* note 24, at 576.

[105] *See* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170 (1951).

[106] Statement by Peter E. Holmes, Director, Office for Civil Rights, Dept. of Health, Education & Welfare, before Subcommittee on Equal Opportunities, Comm. on Education and Labor, U.S. House of Representatives May 21, 1974, *quoted in* Brief for Children's Defense Fund as Amicus Curiae at 21, Goss v. Lopez, 419 U.S. 565 (1975).

[107] The Commercial Appeal (Memphis), May 23, 1975, at 9, col. 1.

[108] Brief for Children's Defense Fund, *supra* note 106, at 23. The five states surveyed were Arkansas, Maryland, New Jersey, South Carolina, and Ohio.

days in four of these states totaled more than 575,000, the equivalent of 3,200 school years.[109] There is also evidence that suspensions tend to fall disproportionately on members of racial minorities. The suspended student was twice as likely to be black than white in Ohio in 1972-1973.[110] New York City schools were composed of 64.4 percent minorities during the same year, but minority students accounted for 85.9 percent of suspensions.[111] One court has noted that "most of the [suspended] pupils . . . are members of 'multiproblem families.' [*sic*] . . . These children emerge . . . from the quagmire of urban poverty and the vast social distortions which now infect the inner city."[112] For these students it is particularly true that "the one state conferred benefit which [has the] greatest monetary value is the right . . . to attend the public schools . . . ."[113] Even a "short" suspension may place the marginal student at a serious academic disadvantage.[114] Furthermore, if the suspension is unjustified, the student may suffer serious psychological harm.[115]

Accordingly, the characterization of short-term suspensions as generically de minimis appears short-sighted.[116] Short-term suspensions,

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[109] *Id.* at 23 n.22.

[110] Eight percent of the black students attending public schools were suspended, as opposed to 3.7 percent of white students. Brief for NAACP as Amicus Curiae at 5, Goss v. Lopez, 419 U.S. 565 (1975).

[111] Brief for Children's Defense Fund, *supra* note 106, at 21-22.

[112] Madera v. Board of Educ., 267 F. Supp. 356, 374 (S.D.N.Y.), *rev'd*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

[113] 267 F. Supp. at 374.

[114] *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 n.4 (5th Cir. 1972) ("magnitude of a penalty should be gauged by its effect upon the student").

[115] The court in Lopez v. Williams, 372 F. Supp. 1279, 1292 (S.D. Ohio 1973) (three-judge court), *aff'd sub nom.*, Goss v. Lopez, 419 U.S. 565 (1975), found that suspensions sometimes lead to: (1) a blow to student self-esteem; (2) feelings of powerlessness and helplessness; (3) resentment, suspicion, and fear toward school authorities; (4) student learning of withdrawal as a means of problem-solving; (5) little student perception of reasons for punishment, or knowledge of offensive act committed; (6) student stigmatization by teachers and school administrators as a deviant with the resulting expectation that the student will be a future troublemaker.

> [S]uspension is a particularly humiliating punishment, evoking images of the public penitent of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of classical Athens. Suspension is an officially-sanctioned judgment that a student be for some period removed beyond the pale.

Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1172 (S.D. Tex. 1971), *vacated*, 475 F.2d 1071 (5th Cir. 1973).

[116] Suspension has been characterized as an "outright confiscation of wealth and status"; a sanction not employed against more traditional forms of property except in the most extreme cases. Reich, *supra* note 50, at 785. Viewed in this light, and considering the potentially devastating effect of a deprivation of schooling especially upon those who

as all deprivations of protectable interests, should be attended by due process.[117]

Although the weight of the student's interests in schooling has been discussed in the context of protectability, its use in that context should be confined to illustrating the fallacy of the de minimis characterization. The proper application of the weight of student interests lies in the balancing process which is determinative of the form due process will take in individual cases.

B. Balancing

The second, balancing step of the *Goldberg-Roth* formulation is employed in determining the nature of the due process protections to be accorded in the individual case. The importance to the individual student of the asserted interest is gauged against the competing governmental interests; these often are related to expedition of adjudication, efficiency of operation, and allocation of scarce resources.[118]

In *Goldberg* the welfare recipients' dependency upon the disposition of welfare payments[119] was found to be so great as to overwhelm the government's interest in efficiency and financial savings. A full panoply of procedural safeguards culminating in a hearing virtually indistinguishable from a trial was necessary in order to protect the recipient's interests adequately. In subsequent cases substantially less complex protections have been required.[120] Elements considered by some com-

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most need it, suspension should not be used as a punishment but only as relief in cases of substantial disruption. "Sufficient reasons cannot exist to partially or totally deprive a student of an education; *there is always an alternative . . . .*" Potts, *Student Suspension and Expulsion: An Overview and Comment*, 3 J. LAW & EDUC. 489, 490 (1974)(emphasis supplied).

[117] "The student has a high order interest in obtaining an education . . . . Any substantial impairment of this interest by reason of sanctions for misconduct should result only after . . . due process of law." Buss, *supra* note 24, at 550.

[118] For example, financial savings alone cannot be the basis of denial of due process. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970), *quoting* Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

[119] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[120] A disciplinary revocation of a prisoner's "privileges" has been held to require notice, a hearing before an impartial tribunal, and representation by counsel. Clutchette v. Procunier, 497 F.2d 809 (9th Cir.), *modified and remanded*, 510 F.2d 613 (9th Cir. 1974). A show-cause oral hearing would have sufficed in the case of a nontenured teacher employed under an executory contract. Huntley v. North Carolina State Bd. of Educ., 493 F.2d 1016, 1019 (4th Cir. 1974). When state law gave notice that teachers would not be reemployed following criminal convictions, no hearing was required. Pordum v. Board of Regents, 491 F.2d 1281, 1283-84 (2d Cir. 1974), *cert. denied*, 419 U.S. 843 (1975). The need to controvert factual assertions required notice of charges and an oral hearing but not complex trial-type proceedings when a prisoner was threatened with transfer to out-of-

mentators to be vital to meaningful due process, including an independent tribunal,[121] the making of a record for review,[122] and holding of an oral hearing,[123] are frequently excluded. Timely notice and holding of the adjudication at a meaningful time are seldom excluded, with two major exceptions. The first is in cases of emergency, when a post-adjudication hearing may be allowed;[124] the second is with counselling sessions involving neither adjudication nor imposition of sanctions.[125]

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state prison. Gomes v. Travisono, 490 F.2d 1209, 1213-14, 1215 (1st Cir. 1973), *cert. denied*, 418 U.S. 910 (1974). Protections on the *Goldberg* order are required before placing a prisoner in penal detention. Palmigiano v. Baxter, 487 F.2d 1280, 1285 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 908 (1974). Despite costs to efficiency which resulted when a college tried to operate under a suspended president, first amendment rights and "liberty" of reputation required a trial-type hearing. Hostrop v. Board of Jr. College Dist. No. 515, 471 F.2d 488, 495 (7th Cir.), *cert. denied*, 411 U.S. 967 (1973).

One of the more highly developed areas of due process balancing involves deprivations relating to federally subsidized housing. When disputed facts known to residents are important, a hearing may be required, but the project manager is considered an adequate tribunal. Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974). When rent increases, for example, are being protested, the tenant's interest in low rents is protectable but may be vindicated by notice and written submissions; no hearing is required since technical and fiscal considerations relating to running large-scale housing operations are expected to be dispositive, and these considerations are thought to be beyond the expertise of tenants. *See, e.g.*, Thompson v. Washington, 497 F.2d 626, 637-38 (D.C. Cir. 1973); Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1167-68 (2d Cir. 1973). A discussion of the earlier cases in this area appears at Note, *supra* note 52, at 880-81.

[121] Reich, *supra* note 50, at 783-88. *But cf.* McCormack, *supra* note 74, at 1258-59.

[122] Professor McCormack views the making of a record for review as possibly the primary function of due process protections, vitiating the need for, for example, an impartial tribunal, but necessarily putting much weight on making of a record. McCormack, *supra* note 74, at 1259, 1299.

[123] Hearings are said always to be required when "there are such rules or mutually explicit understandings that support [the individual's] claim of entitlement . . . that he may invoke at a hearing." Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[124] Only an overriding necessity for instant action can justify summary proceedings without notice. Codispoti v. Pennsylvania, 418 U.S. 506 (1974) (contempt proceedings). Ordinarily, a post-dismissal hearing will not satisfy due process. Skehan v. Board of Trustees, 501 F.2d 31, 38 (3d Cir. 1974), *vacated and remanded*, 95 S. Ct. 1986 (1975); Pordum v. Board of Regents, 491 F.2d 1281 (2d Cir.), *cert. denied*, 419 U.S. 843 (1974).

> Governmental interests which have been held sufficient to outweigh the individual's interest in a prior hearing include the cost to the public of using probably useless drugs, the threat to the credit position of a bank, the finding that food was unfit to eat, the national security, the prevention of tax evasion, the possibility of irregular securities dealing, the pendency of charges of misbehavior by police officers, and the threat to the safety of drivers and pedestrians. In each of these cases, the court scrutinized the pertinent competing considerations to determine whether summary administrative action was justified.

491 F.2d at 1284 (footnotes omitted).

[125] *See, e.g.*, Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966).

There are, however, countervailing considerations. School officials have "important, delicate, and highly discretionary functions."[126] They must maintain the integrity of the educational process, which requires the concomitant broad authority to control and regulate student conduct.[127] Their interests in efficiency and order cannot be discounted, because learning presumably cannot take place in chaos.[128] In requiring procedural protection in school disciplinary proceedings, *Goss* will no doubt force school officials to reassess their priorities and reallocate their time to some extent. "[T]he . . . costs of fairer discipline procedures necessarily result in a shifting of scarce resources from the purposes to which they would otherwise be put."[129] It seems likely that most schools already have implemented simple procedural protections; as the Court pointed out, *Goss* demands procedures "which are, if anything, less than a fair-minded high school principal would impose upon himself . . . ."[130] The balance, then, amounts to trading education for education—the education of the suspended student for tiny amounts of education taken from every other student in the form of administrative resources reallocated to due process. The ultimate resolution of this dilemma is in the constitutional requirement of due process.

In view of these competing interests, how many administrative resources must be reallocated to afford students due process? *Goss* seems to establish a universally applicable procedure, foreclosing the balancing step. What appears to have escaped observation, even by the Supreme Court, is that the only similarity among the thousands of cases to be affected by this maturing doctrine is the punishment. In no two

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[126] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[127] Traditionally the courts have shown sensitivity to the school authorities' interests. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969) (comprehensive authority of school officials recognized but must be consistent with constitutional safeguards).

[128] *But see* C. SILBERMAN, *supra* note 103, at 113-57.

[129] Buss, *supra* note 24, at 574; *cf.* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972), in which the Court stated:

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.

[130] Goss v. Lopez, 419 U.S. 565, 583 (1975). After the *Goss* plaintiffs filed suit, procedures similar to those prescribed by *Goss* were instituted in the Columbus, Ohio public schools. Principals were obligated to investigate the charges against the student prior to suspension and to give the student an opportunity to state his case before dismissing him. *Id.* at 567 n.1. In Mississippi, both the Meridian and Gulfport systems were in substantial compliance with *Goss* prior to the date of the decision. Letter from Dr. Clyde Muse, Superintendent of the Meridian Public School System, to Wilton J. Johnson III, May 22, 1975, on file with the *Mississippi Law Journal*; Letter from Dr. Mercer B. Miller, Superintendent, Gulfport Municipal Separate School District, to Wilton J. Johnson III, May 28, 1975, on file with the *Mississippi Law Journal.*

cases will any other factors be precisely the same: generalization is useless. The question in each case is whether, in light of the competing interests present, a meaningful opportunity[131] has been provided to allow "a person to vindicate [the asserted] claims."[132] For example, if the chief purpose of attendant due process in a given case is to ensure adjudication on the basis of substantial evidence, a record of the proceeding should be required. If the endangered interest can best be vindicated by making a record for review, an impartial tribunal may not be vital.[133] The adjudicative authority should not design protective procedure on the basis of a quantitative relation alone; a qualitative relation is required to make due process protections meaningful.

V. Due Process in *Goss v. Lopez*

In *Goss v. Lopez*[134] the Supreme Court extended limited procedural protection to students suspended from public schools for short terms—10 days or less. The Court held that, absent emergency situations,[135] even short-term exclusions from public school must be attended by notice of the charges and an informal administrative consultation.[136] The Court reached its conclusion after determining that a student's interest in continuing his education is protected by the fourteenth amendment and that the harm flowing from temporary suspensions is not de minimis and therefore is judicially remediable. The Court found that Ohio, by directing local authorities to provide a free education for all school-aged children[137] and by enacting a compulsory attendance statute,[138] created a legitimate entitlement to a public school education

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[131] Consistent with the meaning given to it in many different settings, procedural due process in school discipline must be tested by the extent to which the procedures available to the student conform with fundamental fairness.

Buss, *supra* note 24, at 551, *citing* Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963).

[132] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[133] *See generally* McCormack, *supra* note 74.

[134] 419 U.S. 565 (1975).

[135] The majority held that "as a general rule notice and hearing should precede removal of the student from school." *Id.* at 582. However, they identified "recurring situations" where the requirement of a prior hearing need not be imposed: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." *Id.* Even then, however, the Court stated that notice and hearing "should follow as soon as practicable." *Id.* at 582-83. Regarding the general rule, see note 124 *supra*.

[136] 419 U.S. at 581.

[137] *See* Ohio Rev. Code Ann. §§ 3313.48, .68 (Supp. 1974).

[138] *See id.* § 3321.04 (1972).

on the part of its students.[139] Ohio could not "withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[140] The Court explicitly rejected the board's argument that a due process right to a hearing attached only to severe impairments of constitutionally protected interests. "[A]s long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause."[141] Employing the *Goldberg-Roth* formulation, the Court held that severity of loss is relevant only in ascertaining the form due process must take.

In *Goss* the Court found that the interests of the school lay in maintaining efficiency, discipline, and other conditions necessary for educating. These interests were balanced against the student's interest in ensuring that he is not unfairly or arbitrarily barred from continuing his education, with the attendant ramifications. The Court concluded that "requiring effective notice and informal hearing permitting the student to give his version of the events"[142] to the principal would not impose an undue burden on school officials and would "provide a meaningful hedge against erroneous action."[143] The hearing may take place immediately following oral or written notice.[144] The Court characterized the student's opportunity to be heard as "an informal give-and-take between student and disciplinarian."[145] However, the majority elected to "stop short"[146] of requiring that school authorities allow students to be represented by counsel, to confront their accusers, to cross-examine adverse witnesses, or to call witnesses in their defense. *Goss* requires only that students be told why they are being suspended and be allowed to respond to these charges. As the Court pointed out, the due process requirements *Goss* mandates may be less than those which a principal might, in the interests of justice, impose upon himself.[147]

Justice Powell, joined by three other Justices,[148] dissented, contending that procedural due process safeguards attach only when governmental action severely infringes on a constitutionally protected interest. Suspensions of 10 days or less may involve "some arguable infringement", but "it is too speculative, transitory and insubstantial to justify

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[139] Goss v. Lopez, 419 U.S. 565, 573 (1975).
[140] *Id.* at 574.
[141] *Id.* at 576.
[142] *Id.* at 583.
[143] *Id.*
[144] *Id.* at 582.
[145] *Id.* at 584.
[146] *Id.* at 583.
[147] *Id.*
[148] Chief Justice Burger and Justices Rehnquist and Blackmun joined the opinion.

imposition of a *constitutional* rule."[149] Additionally, the dissent asserted that since discipline in public schools is vital to the functioning of the educational process it is unrealistic to view the state's interest in maintaining an orderly school system as competing with the interests of the individual student. Instead, "the interests here implicated . . . are essentially congruent."[150] To impose adversary positions on pupils and school authorities ignores their "commonality of interests."[151] Thus, the schoolroom setting is distinguishable from the antithetical interests present in *Goldberg*, according to Justice Powell. Mrs. Goldberg's sole desire was to retain her benefits. She had no interest in the efficient functioning of the agency which denied her benefits. Finally, the dissent feared that *Goss* would lead the Court into a "new 'thicket.' "[152] It saw no distinction between the harm flowing from a brief suspension and that which follows from such decisions as failing a student in a course or placing him in a track designed for those with less than average ability. Indeed, Justice Powell maintained that the student may suffer more damage to his reputation and self-esteem from these determinations. Therefore, "the federal courts should prepare themselves for a vast new role in society."[153]

Justice Powell need not have worried. First, since the federal courts had already recognized schooling as protectable, *Goss* broke no new ground but only confirmed an existing doctrine previously unevenly applied. More significantly, however,the majority's holding in *Goss* is remarkable for its mildness. The Court refused to require "even truncated trial type procedures"[154] for short-term suspensions, mandating instead an abbreviated personal confrontation with the disciplinarian prior to suspension. Even this severely curtailed procedural protection may be postponed until after the suspension in "recurring situations" which involve "a continuing danger to persons or property or an ongoing threat of disrupting the academic process."[155]

In prescribing this limited procedure the Court acknowledged the legitimate interests of school officials in curtailing the procedural safeguards afforded students faced with brief suspensions. In fact, secondary school students may have won the battle and lost the war. Compared with *Dixon*'s extensive safeguards which included written notice of charges, an impartial hearing officer, and presentation of witnesses, it

[149] Goss v. Lopez, 419 U.S. 565, 586 (1975) (emphasis in the original) (Powell, J., dissenting).

[150] *Id.* at 591.

[151] *Id.* at 593.

[152] *Id.* at 597.

[153] *Id.* at 599.

[154] *Id.* at 583.

[155] *See* note 135 *supra*.

is hardly arguable that the *Goss* requirements will disrupt the public schools or even substantially alter the manner in which most schools now deal with their disciplinary problems.

In its deference to those administrative interests the *Goss* Court may have oversimplified the problems. First, the Court pointed out that the informal conference applied only "to the short suspension, not exceeding 10 days."[156] What additional protections, if any, attach when a student is suspended for 11 days? "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[157] The Court's acknowledgment that a case-by-case analysis is required for slightly longer suspensions indicates that strict due process should require the same analysis for short-term suspensions. Uniform procedure cannot be fully effective because no two cases are alike. As one court has stated, "[a] suspension of even one hour could be quite critical" depending on circumstances.[158] Secondly, the situations in which students can be excluded without prior notice and hearing must be delineated. *Goss* stated a preference for antecedent safeguards[159] but identified three instances in which students "may be immediately removed from school."[160] Two of the situations—persisting danger to persons or to property as a result of the student's presence—unquestionably warrant summary action. However, the third situation, "an ongoing threat of disrupting the academic process,"[161] if applied too broadly, could render *Goss* of little practical consequence. Lacking a more clearly articulated standard this third exception could be employed against such relatively innocuous behavior as repeated talking in class, thereby far transcending the original "emergency" rationale of the exceptions.[162] Thirdly, *Goss* does not address the problem of self-incrimination inherent in any hearing which might lead from suspension to additional adjudicative proceedings. If juvenile or criminal court proceedings against the student are contemplated, his interests may require presence of counsel at the "informal" suspension hearing, no matter how short the suspension. That the suspension hearing is characterized as civil should not be dispositive. Discussing the civil-criminal distinction relative to the privilege against self-incrimination, the Supreme Court stated in *In re Gault*:[163]

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[156] Goss v. Lopez, 419 U.S. 565, 584 (1975).

[157] *Id.*

[158] Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 n.4 (5th Cir. 1972).

[159] Goss v. Lopez, 419 U.S. 565, 582 (1975).

[160] *Id.*

[161] *Id.*

[162] The *Tinker* standard, imposed in a first amendment context of substantial and material interference with the operation of the school, may solve this problem. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

[163] 387 U.S. 1 (1967).

> [t]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may . . . be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.[164]

Of course, the Court could not and did not hold that students facing dismissal are entitled to counsel, in view of the inordinate burden that right would place on school systems.[165] It did acknowledge the possibility that in unusual situations, even those involving only short suspensions, something more than the rudimentary procedures might be required.[166] Probably school boards would not be required to retain counsel to represent students at *Goss* hearings or even to allow private counsel to appear. By prohibiting use in subsequent judicial or quasi-judicial proceedings of any statements made by the student to the disciplinarian during the *Goss* hearing, a protection equivalent to the presence of counsel may be achieved. New York has enacted a statute to this effect.[167] Absent such immunity the need for counsel is manifest if the student faces juvenile or criminal sanctions as a result of the incident for which he is being suspended. Fourthly, and perhaps most fundamental, will the *Goss* procedures prove effective as a "meaningful hedge against erroneous action"?[168] No conference will occur in any case unless the student is thought to have warranted suspension. Usually it will be the teacher who reports the student. Principals, frequently desk-bound, will rarely be witnesses to the alleged misconduct. The disciplinarian, then, is forced to choose between the word of a teacher or that of the accused student, without aid of witnesses or the presence of the accuser. Faced with this situation, one study concluded that "most school officials have no difficulty recognizing their natural allies . . . ."[169] "[T]he teacher's word always counts more than the student's."[170] This attitude seems

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[164] *Id.* at 49.

[165] "Brief disciplinary suspensions are almost countless." Goss v. Lopez, 419 U.S. 565, 583 (1975).

[166] *Id.* at 584.

[167] N.Y. FAMILY COURT ACT § 735 (McKinney 1963). The statute provides in part:

> No statement made during a preliminary conference may be admitted into evidence at a fact-finding hearing or, if the proceeding is transferred to a criminal court, at any time prior to conviction.

The New York courts held suspension-placement proceedings to be a "preliminary conference" in Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), *aff'd mem.*, 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1967).

[168] Goss v. Lopez, 419 U.S. 565, 583 (1975).

[169] Haney & Zimbardo, *The Blackboard Penitentiary—It's Tough to Tell a High School From a Prison*, PSYCHOLOGY TODAY, June 1975, at 26, 29.

[170] *Id.*

> [O]ne school official told us candidly he would never support a student in a

only natural on the part of an administrator who depends on the loyalty of the teacher in a day-to-day working relation.[171] To accept the student's version would be, in effect, to substitute his judgment for that of the eyewitness teacher, and worse, to appear to question the teacher's reliability.

If the functions of due process are to provide timely notice, an impartial fact finding process, and a record for review, which provides an impression of fairness, then the *Goss* proceedings are insufficient. *Goss* provides oral notice immediately preceding a hearing before a tribunal whose impartiality is at best suspect and provides no record for review. Under these conditions any appearance of fairness is dubious.

The chief danger of the *Goss* holding lies in the possibility that it will be treated as dispositive of all short-term suspension. Such an interpretation would deny the very nature of due process. The fact that two students are threatened with identical short-term suspensions does not mean that identical procedures will ensure due process for both. For a good student involved in a rare disciplinary experience a short suspension may in fact be de minimis, but for a repeat offender each additional disciplinary sanction may have a substantial cumulative effect. Such variations in student interest are what the *Goldberg* balancing step was intended to accommodate. To read *Goss* as establishing a uniform procedure for every short-term case, therefore, is to create an exception to the *Goldberg* requirement. *Goldberg* and *Goss* may be reconsidered, however, if *Goss* is read to require that due process attaches to short-term suspensions with the appropriate procedure to be tailored to the individual student's situation. In the light of *Goldberg*, *Goss* should be read no other way.

VI. The Effect of *Goss* in Mississippi

The *Goss* majority stressed that due process was appended to Ohio's school disciplinary proceedings because "on the basis of state

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dispute with a teacher, but would only try to convey an impression of fairness "to prevent parents from getting involved."

Id. at 29-30.

[171] The Court has recognized the importance of maintaining good relations between teachers and their immediate supervisors. In Pickering v. Board of Educ., 391 U.S. 563 (1968), the Court, holding a teacher improperly dismissed after writing a letter to a newspaper criticizing the school board's financial priorities, noted:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining . . . discipline by immediate supervisors . . . is present here. Appellant's employment relationships with the Board and . . . with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70.

law, appellees plainly had legitimate claims of entitlement to a public education."[172] These claims were rooted in Ohio statutes ordering local authorities to provide a free education to all school-age residents[173] and compelling attendance of all persons between the ages of 6 and 18.[174] The Court felt that these statutes indicated Ohio's "[h]aving chosen to extend the right to an education to people of . . . appellee's . . . class generally"[175]—a protectable interest.

State constitutions generally require the legislature to provide free public education for all school-age children.[176] In Mississippi, however, this is not the case. The Mississippi constitution states that "the Legislature may, in its discretion, provide for the maintenance and establishment of a free public school or schools in each county . . . ."[177] Additionally, the Mississippi constitution vests in the legislature explicit authority to abolish all public schools.[178] The second part of Ohio's state-created entitlement stemmed from a compulsory attendance statute. Again, Mississippi is one of the few states lacking such a stricture.[179]

The emphasis in *Goss* on this grounding of entitlement in state law may be misleading. The Court, seeking the strongest of the available justifications for designating schooling as a protectable interest, picked state law, the grounding considered most secure.[180] However, as has been discussed, actual codification is not necessary. State courses of conduct leading to "understandings"[181] have been held sufficient to support protectable claims; a student's reputation and his acquisition of "useful knowledge" have similarly been found adequate.[182] Schooling, therefore, at least for *Goss* purposes, is certainly a protectable interest in Mississippi.

Under state law, students in Mississippi cannot be suspended except by the principal, the superintendant of education, or the board of trustees.[183] Statutory grounds for suspension or expulsion include misconduct,[184] "when the best interest of the school makes it necessary,"[185]

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[172] Goss v. Lopez, 419 U.S. 565, 573 (1975).

[173] OHIO REV. CODE ANN. §§ 3313.48, .64 (1954).

[174] *Id.* §§ 3321.01 *et seq.*

[175] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[176] *See, e.g.*, MICH. CONST. art. 8, § 2; N.Y. CONST. art. 11, § 1.

[177] MISS. CONST. art. 8, § 205.

[178] *Id.* § 213-B (c).

[179] For an example of compulsory attendance laws, see MICH. COMP. LAWS ANN. § 340.731 (1967) (children 6 to 16 years of age).

[180] See notes 83 through 85 and accompanying text *supra*.

[181] See note 85 and accompanying text *supra*.

[182] See notes 87 through 90 and accompanying text *supra*.

[183] *See* MISS. CODE ANN. §§ 37-7-301(o), -9-71 (1972).

[184] *Id.* § 37-7-301(c).

[185] *Id.*

mental or emotional abnormality,[186] participation in secret societies, fraternities, and sororities,[187] damaging school property,[188] and "filthy or vicious habits."[189] No hearing is provided prior to suspension or expulsion by the board of trustees, but exclusions by principals or superintendents "shall be subject to review by and the approval or disapproval of the board of trustees."[190] Several Mississippi schools, however, were in compliance with *Goss* prior to the decision. The Jackson school system adheres to procedures more stringent than the *Goss* short-term suspension protections. The principal must independently investigate the facts leading to the proposed sanction, bringing together all participants "so that he may hear differing views . . . of persons affected by the incident."[191] Both the Meridian system[192] and the Gulfport system[193] also appear to be in substantial compliance with *Goss*.

Suspension statistics in Mississippi are not as alarming as were the earlier examples.[194] During the 1973-1974 school year DeSoto County schools suspended 544 students out of a student population of 12,676,[195] less than 5 percent of the enrollment. In Gulfport, however, during 1974-1975, 986 suspensions occured in a student population of 7,520;[196] assuming that no student was suspended more than once, this ratio exceeds the 10 percent figure mentioned earlier.[197] In 1973-1974, the Jackson

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[186] *Id.*

[187] *Id.* § 37-11-43.

[188] *Id.* § 37-11-19.

[189] *Id.* § 37-7-301(h).

[190] *Id.* § 37-9-71.

[191] ADMINISTRATIVE SERVICES HANDBOOK § 57.5, *cited in* Maeberry v. Fortenberry, Civil No. J74-44(c) (S.D. Miss., dismissed Apr. 30, 1974). For suspensions exceeding 5 days in length the student must be afforded a hearing before a committee composed of three or more school administrators, none of whom may be on the staff of the school from which the pupil has been suspended. ADMINISTRATIVE SERVICES HANDBOOK § 57.5. The student will be allowed to remain in school pending the hearing "if the principal determines that his continued presence is not detrimental to the school program." The committee is empowered to suspend a pupil for no more than 20 consecutive schools days. The committee will make a written, confidential summary of its proceedings, and render a written decision. The student is entitled to be represented by counsel, to present witnesses in his defense, and to cross-examine adverse witnesses. *Id.* §§ 57.5, 209.5, 224.

[192] Letter from Dr. Clyde Muse, *supra* note 130.

[193] Letter from Dr. Mercer B. Miller, Superintendent of the Gulfport Municipal Separate School District, to Wilton J. Johnson III, May 28, 1975, on file with the *Mississippi Law Journal*.

[194] See text accompanying notes 106 through 111 *supra*.

[195] Letter from W. S. Carter, Superintendent of the DeSoto County School District, to Wilton J. Johnson III, May 19, 1975, on file with the *Mississippi Law Journal*.

[196] Letter from Dr. Mercer B. Miller, *supra* note 130. Four hundred and seventy-five students were excluded for single days; 125 for 2 days; 347 for 3 days; 3 for 4 days; and 36 for 5 days. *Id.*

[197] See text accompanying note 108 *supra*.

schools suspended for 20 days or less 765 students out of 27,794.[198]

VII. APPLYING *Goss*

How *Goss* will be interpreted and applied by the lower federal courts is problematic. In any event, the following recommendations fall well within the *Goss* guidelines if employed in routine suspensions not exceeding 10 days:

(1) When an infraction believed to warrant suspension has been reported, the accused student should be called to the office of the school official charged with maintaining discipline, usually an assistant principal. If more than one student is involved, each should be interviewed separately.

(2) The student should be informed of the details of the charge against him. A statement of the suspected violation should be put in writing along with a statement that the student has been advised of the charge prior to any adjudication. The student should sign the writing and be given a copy.

(3) If the student contests the allegations of the charge, the disciplinarian should hear the student's full account or denial of the incident. If possible the student should write down his version, and a copy should be filed with a copy of the charge; in this manner a rudimentary record will be made, lessening the necessity for an impartial tribunal. Additionally, the disciplinarian should ask about students, faculty members, or others whom the student believes would corroborate his version.

(4) The student should then be allowed to return to class unless this would be disruptive; he should be told that he will be able to confer with the principal before any disciplinary action is taken against him.

(5) The disciplinarian should conduct a brief informal investigation of the alleged incident, including talks with the accuser and witnesses, if there are any. This inquiry should be low-key to avoid disturbance of the educational environment; teachers and students should be approached during lunch, study hall, or free periods.

(6) The disciplinarian should report to the principal, outlining the basis of the charges, alerting him to the existence of potential factual disputes, stating his own conclusions as to the truth of the charges, and recommending whether a sanction should be imposed.

(7) The student should report to the principal, who should explain the results of the disciplinarian's inquiry. Should the principal believe that suspension is warranted, he should inform the student of the nature of the evidence against him and allow him a chance to rebut it. If the

[198] School District Summary Report, Jackson Municipal Separate School District (Elementary and Secondary School Civil Rights Survey, Fall 1974). By race these suspensions numbered 583 black students and 182 white students. *Id.*

principal remains convinced of the necessity of suspension, he may suspend the student for as long as 10 days.

It should be reiterated that suspension is a drastic sanction, antithetical to the purposes of schooling. Administrators are encouraged not to employ it where other, milder sanctions can be found, except in cases of substantial disruption, when the educational cost to other students of retaining the troublemaker in school outweighs the educational cost to the suspended student.

Wilton Jerome Johnson III
Martin C. McWilliams, Jr.

A RECOMMENDATION FOR COURT-APPOINTED COUNSEL IN CHILD-ABUSE PROCEEDINGS

The purposes of this comment are to provide an understanding of the child abuse phenomenon, present a survey of existing child abuse legislation in Mississippi, and to make what the authors consider a necessary recommendation for alteration of the existing Mississippi child abuse law. This recommendation is believed to be a realistic and attainable proposal for legislative or judicial modification. This comment will not provide an in-depth exploration of the sociological aspects of child abuse for this has and is being done by persons much more qualified than the authors.[1] It has been suggested that innovative and far-reaching programs be proposed such as those other jurisdictions are utilizing.[2] This will not be done for the reasons that at the present time there apparently is neither the money nor the political motivation for such "progressive experimentation" in this state. It is hoped that the proposal suggested by this comment will be incorporated into the legal and social framework presently used in Mississippi to deal with the child abuse problem.

Our recommendation is that counsel be provided for every child brought before the court in its investigation of child abuse allegations and in other child-related judicial proceedings. A correlative aspect of this proposal is that counsel be similarly provided for parents who cannot afford to retain counsel in child abuse or related child welfare judicial proceedings. This recommendation is not to the exclusion of other proposals for modification of child abuse legislation in Mississippi. On the contrary, significant changes were proposed, and some enacted, during the 1975 legislative session, which will have a major impact on child abuse proceedings.[3] However, the scope of this comment is consciously limited to the previously mentioned proposal because it is the authors'

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[1] *See, e.g.*, D. BAKAN, SLAUGHTER OF THE INNOCENTS (1971); V. FONTANA, THE MALTREATED CHILD (2d ed. 1971); D. GIL, VIOLENCE AGAINST CHILDREN (1970); C. KEMPE & R. HELFER, HELPING THE BATTERED CHILD AND HIS FAMILY (1972).

[2] *See* Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 346 (1972).

[3] Bills were introduced in both the Mississippi Senate and House proposing extensive amendments to the Youth Court Law. Although their provisions were substantially the same, the senate bill, which died in committee, would also have authorized the youth court judge to appoint attorneys to represent petitioners in child abuse proceedings. Senate bill 2172 (1975). The house bill, as enacted and approved by the Governor, made several worthwhile reforms; however, it further restricted the availability of counsel by forbidding the Department of Public Welfare from employing private counsel in youth court proceedings. Act of April 7, 1975, H.R. 1065, § 3, 1975 Reg. Sess., Miss. Legis. 8-25, *codified at* MISS. CODE ANN. §§ 43-21-5, -11, -17, -25 (Supp. 1975).

belief that it is the surest method of improving the legal framework designed to deal with child abuse.

An underlying theme throughout this comment is that child abuse is a societal phenomenon, the ramifications of which are not fully understood. Assuming that this lack of knowledge of the various aspects of the child abuse problem exists on the local level, it is hoped that the right-to-counsel recommendation, if implemented, will provide needed additional input into judicial proceedings as well as greater assurance that fairness will dictate their disposition.

I. Child Abuse: Defining the Problem

Maltreatment of children is universal and has at times even been sanctioned by law.[4] In this country, the first reported case of child abuse occurred in 1655 when a master's maltreatment of a 12-year-old apprentice resulted in the death of the child.[5] However, coordinated efforts in the United States in the area of child protection did not come about until well into the 19th century.[6] From the very beginning of these efforts there has been a conflict of philosophies concerning the best means of securing child protection. One school of thought advocated the law enforcement approach to child protection emphasizing the use of police powers. This group sought jail sentences for abusing parents.[7] The other school disapproved of these police methods and concerned itself with preventive, remedial, and economic efforts to strengthen the home. This philosophy became the foundation for contemporary protection services.[8] These philosophical differences persist to this day.[9] However, it appears that the protective services philosophy has become dominant.[10]

The phenomenon of child battering is incredibly complex. Discussions of it must usually be grounded in generalizations. Perhaps the most informative generalization to be found concerning child abuse was provided by Mason P. Thomas, Jr.:

> The primary incidence of child abuse is in poor families; recidivism is high in abusing families, with patterns of abuse being transmitted from one generation to the next; child abuse is most prevalent in large fami-

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[4] Thomas, *supra* note 2, at 295.

[5] The master was convicted of manslaughter, all his goods were confiscated, and it was ordered that he be "burned in the hand." *Id.* at 304.

[6] For a detailed history of child protection law in the United States, see *id.* at 306-12.

[7] *Id.* at 312.

[8] *Id.*

[9] *See* Miss. Code Ann. §§ 43-21-11, -27 (Supp. 1975).

[10] *See id.* § 43-21-19 (1972).

> lies and matriarchal households; more older children (as distinguished from infants) are victims than had previously been suggested; the abused child's behavior can be provocative and a substantial factor in abuse; and both abusing parents and their child victims have troubled personal histories.[11]

Particular instances of abuse are often caused by the presence of three components: A potentially abusing parent, a child, and a sudden crisis; often with a lethal result.[12] The battering can produce both severe physical damage and irreversible psychological and emotional disturbances to the child.[13] Statistical estimates of instances of child abuse vary greatly. An often quoted estimate of the number of physically abused children in the United States is approximately 380 cases of physical abuse per million.[14] It is generally recognized that the physical damage, and perhaps the psychological and emotional injury, is directly correlated with the duration of the abuse.[15] This, plus the fact that child abuse is a repetitive phenomenon,[16] demonstrates the need for immediate identification of the abused child so the state can mobilize its efforts to protect the child. Identification is usually accomplished by medical personnel who are required to report instances of child abuse in accordance with the particular state's reporting law.[17] A central registry

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[11] Thomas, *supra* note 2, at 336. These findings were drawn from a national epidemiologic survey completed in 1968. *Id.* For a report of the findings, see D. GIL, *supra* note 1, at 130.

[12] Fontana, *To Prevent the Abuse of the Future*, 10 TRIAL, May-June 1974, at 14. Dr. Fontana examines the personality traits that are most often, but not always found in abusing parents. They are usually immature, narcissistic, egocentric, demanding, impulsive, depressed, and aggressive. Other important characteristics found in the family structure of many abusing parents were divorce, alcoholism, drug addiction, mental retardation, recurring mental illness, unemployment, and financial stress. *Id.* Mistreatment of children is most often seen in poor urban areas. One reason for this is because poor parents cannot afford to remove themselves from stress situations (such as by hiring a babysitter). Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT. L. REV. 45, 50 (1973).

[13] Fontana, *supra* note 12, at 16.

[14] Fraser, *Toward a More Practical Central Registry*, 51 DENVER L.J. 509 (1974). This excludes neglect, sexual abuse, and emotional abuse. *Id.* n.1. Other sources have estimated annual instances of child abuse as high as 500,000. Brown, Fox & Hubbard, *supra* note 12, at 46, *citing* N.Y. Times, Aug. 16, 1971, at 16, col. 3. Dr. Vincent Fontana quotes the Journal of the American Medical Association on this subject:

> [T]he assaults on children, if complete statistics were available, could turn out to be a more frequent cause of death than such world-recognized and thoroughly studied diseases as leukemia, cystic fibrosis, muscular dystrophy, and might even rank with automobile fatalities.

Fontana, *supra* note 12, at 14.

[15] Fraser, *supra* note 14, at 514.

[16] *Id.* at 509.

[17] *See, e.g.*, CAL. PENAL CODE § 11110 (West Supp. 1975); MISS. CODE ANN. § 43-21-

is utilized by many jurisdictions to aid identification.[18] The central registry is an information bank and clearinghouse for past reported instances of child abuse. Ideally, the central registry would aid a doctor in diagnosing a suspected case of child abuse as well as provide background information for subsequent investigation of the child and parents.[19]

Mass media coverage of child abuse since the 1960's has been largely responsible for the passage of child abuse reporting statutes in every state between 1963 and 1967.[20] More recently, the federal government has taken action with the passage of the Child Abuse Prevention and Treatment Act.[21] The Act establishes an office under the auspices of the Department of Health, Education, and Welfare to act as an information clearinghouse for private and state pilot programs dealing with child abuse.[22] These programs will be funded with $60,000,000 over the 3-year period of 1974-1976.[23]

II. History of Child Abuse Law

A. *The Doctrine of Parens Patriae*

For a more comprehensive understanding of contemporary child abuse legislation it is necessary to examine the legal theories concerning the rights of the essential parties: the parents, the child, and the state.[24] The earliest legal doctrine affecting this tripartite relationship was the doctrine of *patria potestas* derived from Roman private law.[25] Under this theory the father controlled every aspect of his child's life, including the

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11 (Supp. 1975); N.Y. Soc. Welfare Law § 413 (McKinney Supp. 1974); Ohio Rev. Code § 2151.42.1 (Page Supp. 1973).

[18] *See, e.g.*, Cal. Penal Code § 11110 (West Supp. 1975); N.Y. Soc. Welfare Law § 422 (McKinney Supp. 1974). The central registry in Mississippi was administratively created and is located in the Department of Public Welfare.

[19] Fraser, *supra* note 14, at 514.

[20] Thomas, *supra* note 2, at 332.

[21] 42 U.S.C.A. § 5101 (Supp. 1975).

[22] *Id. See also* 42 Fordham L. Rev. 935, 936 n.11 (1974).

[23] 42 U.S.C.A. § 5101 (Supp. 1975).

[24] For an analysis of the competing interests and relative powers of the parties in the child welfare area, see the series of articles by Kleinfeld, *The Balance of Power Among Infants, Their Parents, and the State, Part I*, 4 Fam. L.Q. 319 (1970); *Part II*, 4 Fam. L.Q. 408 (1970); *Part III*, 5 Fam. L.Q. 63 (1971).

[25] Andrew J. Kleinfeld contends Artistotle theorized that the purpose of parental control was for the welfare of the child rather than the welfare of others in society or to benefit the parent. Kleinfeld, *Part II, supra* note 24, at 411. He fails, however, to give support for his belief. He further maintains that this purpose suggests that the state should regulate parental supervision to prevent it from adversely affecting the welfare of children. Finally, Kleinfeld indicates that the idea of regulated parental control dominates contemporary American law in every state. *Id. See, e.g.*, Miss. Code Ann. § 43-21-11 (Supp. 1975).

power over life or death.[26] Another theory originating in Roman law, the doctrine of *parens patriae*, undercut the absolute power of the father under the *patria potestas* theory and became the cornerstone of contemporary juvenile law. Under this doctrine state intervention into the parent-child relationship is justified on two grounds: First, the state will protect all who cannot protect themselves,[27] and second, the state may compel parents and their children to act in ways most beneficial to society.[28] The *parens patriae* doctrine has increasingly been used to justify state intervention into family affairs to halt harmful exercises of parental prerogatives.[29] At present the *parens patriae* doctrine and the principle of "the best interest of the child" are the guiding rules in the states' treatment of minors.[30] Mississippi's adherence to these principles is shown in its case law[31] and statutes.[32]

The rights of parents and children are perhaps most clearly understood in relation to one another. Conceptualization of the rights of parents can be derived from one definition of parental power: "[It is the] residue of all power not lodged elsewhere by the law."[33] However, certain duties are imposed on parents along with these rights.[34] According to

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[26] Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 109 (1971). The power of the father over the child extended into adulthood. Thomas, *supra* note 2, at 295.

[27] Note, *A Case for Independent Counsel to Represent Children in Custody Proceedings*, 7 NEW ENG. L. REV. 351, 352 (1972). This imposes a duty upon the state to protect infants from parents and others who might harm them. Kleinfeld, *Part III, supra* note 24, at 107.

[28] Kleinfeld, *Part III, supra* note 24, at 107.

[29] Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 366 (1972). Although this doctrine was originated to deny liberty to parents in many cases, it has been applied to take liberty from infants. Kleinfeld, *Part III, supra* note 24, at 69. *See In re* Gault 387 U.S. 1 (1967).

The state's duty to intervene in cases of parental neglect began to receive recognition about 1825. Thomas, *supra* note 2, at 306.

[30] Weiss, *The Emerging Rights of Minors*, 4 U. TOLEDO L. REV. 25, 26 (1972).

[31] A succinct statement of Mississippi's position is:

> There can be no doubt, under the doctrine of *parens patriae*, that the State has the sovereign power of guardianship over persons under disability . . . . To insure the best interests of a child, the power of the State transcends the rights of natural parents; and if they are unfit to have the custody, their children may be taken from them.

Eggleston v. Landrum, 210 Miss. 645, 651, 50 So. 2d 364, 366 (1951).

[32] *See* MISS. CODE ANN. §§ 43-21-11 (Supp. 1975), 43-21-19 (1972).

[33] Kleinfeld, *Part II, supra* note 24, at 413. The power of a parent extends to all areas of the child's life, except where there is an expression of a contrary public policy. *Id.*

[34] Kent's lectures on the common law principles of family government disclose the author's belief that the rights of parents are derived from their duties:

> As they [parents] are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority,

Blackstone, a parent owed three duties to a child: To provide maintenance, protection, and education.[35] Failure to perform these duties is, at least theoretically, grounds for intervention of the state under the *parens patriae* theory. In Mississippi, however, a significant obstacle must be overcome before a parent's custodial rights to his child may be affected. In this state there is a legal presumption that a child's welfare is best promoted by parental custody.[36] Only when there has been a showing that the parent is patently unfit may the state intervene and assert its authority over the child.[37] This is the traditional view of custody rights and is followed by many jurisdictions in the United States.[38] A more contemporary view of custody rights revolves around the concept of "the best interests of the child." Under this view, the court will award custody to the person or agency it believes will best promote the welfare of the child.[39] Although this terminology appears in several Mississippi statutes,[40] to date, the courts have not abandoned the presumption favoring parental custody of the child.[41]

B. Recent Developments

Although numerous legal doctrines benefiting the parent have developed in the United States,[42] there is virtually no statutory or case law delineating the rights of children.[43] In fact, in the past, children have been treated as something less than persons before the law without the benefit of any rights.[44] The need for a rational approach to this problem and a theoretical vehicle for change in the area of minor's rights are suggested by Professor Henry H. Foster and Dr. Doris Jonas Freed:

> [W]hat we need is the philosophical base that children are persons and that there must be justification in terms of current social reality for denying them the rights of persons. It is naive to assume that rules

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a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. This is the true foundation of parental power . . . .

2 J. KENT, COMMENTARIES ON AMERICAN LAW *203.

[35] 2 W. BLACKSTONE, COMMENTARIES *447-52.

[36] Reynolds v. Davidow, 200 Miss. 480, 484, 27 So. 2d 691, 692 (1946).

[37] *Id.* at 484-85, 27 So. 2d at 692.

[38] Thomas, *supra* note 2, at 340. Under this view the child is often treated as a chattel. *Id.*

[39] *Id.*

[40] *See, e.g.*, MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[41] *See* Thibodeaux v. Hilliard, 287 So. 2d 434 (Miss. 1973) (presumption announced in *Reynolds* recognized as "firmly established in the jurisprudence of this State").

[42] For example, parents in Mississippi have benefited since 1891 by immunity from tort actions instituted by their children. Hewlett v. George, 68 Miss. 703, 711, 9 So. 885, 887 (1891).

[43] Forer, *Rights of Children: The Legal Vacumn*, 55 A.B.A.J. 1151 (1969).

[44] *See* Foster & Freed, *supra* note 29, at 372; Kleinfeld, *Part I, supra* note 24, at 325.

> derived from feudalism actually serve their best interests or are protective, and in the spirit of requirements for classification under the equal protection clause, the burden should be on the proponent of differentiation.[45]

Several authors have outlined conceptual frameworks delineating rights of children, none of which have gained significant acceptance by the courts.[46] Hopefully, the line of Supreme Court decisions beginning with *Kent v. United States*[47] and *In re Gault*[48] are harbingers of a long overdue change in the status of children under the law.[49] But to protect and effectuate this change in status, it is necessary to recognize a child's right to counsel in all judicial proceedings.

III. Mississippi Child Abuse Law

It is widely recognized that effective state action can come about only through an interdisciplinary approach to instances of child abuse. The need for such an approach was effectively expressed by Mason P. Thomas, Jr.:

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[45] Foster & Freed, *supra* note 29, at 372.

[46] *See, e.g.*, Forer, *supra* note 43, at 1154, suggesting four basic rights in need of judicial recognition: (1) The right to life; (2) the right to a home; (3) the right to an education; (4) the right to liberty. *See also* Foster & Freed, *supra* note 29; Weiss, *supra* note 30.

[47] 383 U.S. 541 (1966).

[48] 387 U.S. 1 (1967).

[49] In the decisions in *Gault* and *Kent*, it was held that juveniles were guaranteed the same protections as adults in criminal proceedings which could result in the juvenile's loss of liberty. These decisions guaranteed minors the rights to hearings, to representation by counsel, opportunities to confront and cross-examine witnesses, and the privilege against self-incrimination. The Supreme Court later expanded these rights, applying the guarantees of *Gault* and *Kent* to hearings wherein the minor's delinquency was to be determined by the juvenile court. *In re* Whittington, 391 U.S. 341 (1968). The Court has also said that, while not all aspects of juvenile proceedings need conform to the standards of adult criminal trials, due process requires that guilt in juvenile trials must be established beyond a reasonable doubt, rather than simply by a preponderance of the evidence as the former practice had been. *In re* Winship, 397 U.S. 359 (1970). Recognizing that although the juvenile court proceeding is denominated a "civil" action its essential nature is criminal, the Court extended the double jeopardy protection of the fifth amendment to state juvenile court proceedings where evidence is taken to determine if the juvenile has committed a crime. Breed v. Jones, 95 S. Ct. 1779 (1975). However, the Court has held that the requirements of due process do not ensure minors the right to a jury trial in the adjudicative phase of a juvenile delinquency proceeding. McKeiver v. Pennsylvania, 403 U.S. 528 (1970). Recently, in dictum, the Court acknowledged the states' interest in maintaining the anonymity of juvenile offenders. Davis v. Alaska, 415 U.S. 308 (1974).

Although these cases were confined to bestowing procedural rights upon minors in juvenile delinquency proceedings, it is hoped that this judicial attitude will spread to other areas of child-related law.

> The study, understanding, and development of programs to deal effectively with child abuse and neglect are beyond the professional competence of any one of the related professional disciplines—law, medicine, social work, psychiatry, psychology, and others—and beyond the capacity of any single community resource—law enforcement, welfare programs, courts, hospitals, private family agencies, and so forth. Thus, effective programs will require interdisciplinary efforts and coordination of community resources. Such cooperation and coordination have always been difficult to achieve.[50]

Interdisciplinary coordination on the local level is a prerequisite to effective allocation of state resources in coping with the problem of child abuse.

A. A Procedural Framework

The basic functions of state procedures in dealing with instances of child abuse are identification, reporting, mobilization of state resources for protection of the child, adjudication, and rehabilitation. The initial stage in child abuse cases is identification of the abused or battered child. Those persons which the state believes to be in the best position to see the results of child abuse are required by statute to report possible instances of abuse to the agency having jurisdiction.[51] Many states require compliance by only medical personnel,[52] probably on the assumption that they are the only persons qualified to make this determination.[53] The purpose of the reporting requirements is to bring the state's attention to the particular case of suspected child abuse. It is, therefore, urged that anyone in a position to observe suspected child abuse be required to report and receive appropriate protection for his action.[54]

After a report is received by the statutorily authorized agency, the state's child protective resources are mobilized to ensure the safety of the victim of the suspected child abuse. The effectiveness of the state response is often a life or death proposition.[55] The personnel responding

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[50] Thomas, *supra* note 2, at 329.

[51] MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[52] *See, e.g.*, ALA. CODE tit. 27, § 21 (Supp. 1973); ARK. STAT. ANN. § 42-802 (Supp. 1973); FLA. STAT. ANN. § 828.041(4) (Supp. 1975).

[53] Mississippi recently expanded the class of persons required to report suspected cases of abused children. The list now includes psychologists, teachers, principals, social workers, child care workers, law enforcement officers, and ministers, in addition to medical personnel. MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[54] Reporters are usually given some sort of immunity from civil and criminal liability which might result from their reports. *See, e.g.*, ALA. CODE tit. 27, § 23 (Supp. 1973); ARK. STAT. ANN. § 42-804 (Supp. 1973); FLA. STAT. ANN. § 828.041(9) (Supp. 1975); MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[55] Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L.

to the report are required to make several decisions the results of which have potentially far-reaching consequences.[56] The persons responding to the report must locate the child, determine whether the child has been abused, and decide whether the child is in immediate danger of harm requiring removal from his environment.[57] If subsequent investigation produces considerable evidence of child abuse, an action will be instituted in the courts.

The function of the adjudicatory stage[58] is to determine if the child has been abused, ascertain the best interest of the child, and then make appropriate orders to attain this goal. It is at this stage that input from all sources should be available to allow the judge to make the most informed determination possible. The judge usually has a series of options ranging from supervision of the child in his house to complete termination of parental rights.

The last stage, rehabilitation, is usually closely tied to the adjudicatory stage, and may be the result of court orders. It is crucial that the victim of abuse be given treatment beyond care for his physical wounds. Treatment should also be provided to the abuser in the hope that his behavior can be modified to prevent future occurrences of abuse. The case for treatment of the abuser is even stronger when he is allowed to retain custody of his victim. Temporary separation of the child from the abusing parent, without concern for effective rehabilitation and preventative measures directed at eliminating psychological and social factors fostering abuse, is a totally inadequate state response.[59]

B. Statutory Provisions

The current Mississippi child abuse statutory framework was passed in 1966.[60] This legislation was codified as the Youth Court Law in Mississippi Code Annotated of 1972, sections 43-21-1 through 43-21-

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REV. 1, 15 (1967) ("[W]hat is actually done when a report is received is the all-important question . . . .").

[56] Fraser, *supra* note 14, at 514-15, proposes that a multi-disciplinary child protection unit be established to receive, respond to, and investigate all reports of suspected child abuse.

[57] The services of a protective service agency may be utilized before any instances of child abuse occur in a family. For example, if interdisciplinary communications function properly, reports might flow into protective services from any number of sources that a particular family was in the midst of a crisis. The protective service agency, therefore, could respond with an assortment of options to improve the family situation. *See* Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 707 (1966).

[58] Reference to the adjudicatory stage here is concerned primarily with treatment of the child. It is not concerned with criminal prosecution of the suspected abuser.

[59] Fontana, *supra* note 12, at 16.

[60] Act of May 6, 1966, ch. 377 [1966] Gen. Laws Miss. 696.

55. The youth court division of every county court is the source of precedent under this law.[61] If no county court exists in a particular county the youth court division becomes a part of the chancery court.[62] The statutory definition of a battered and abused child now includes both mental and sexual abuse in addition to actual physical injury.[63]

Mississippi, like all other states, requires certain specified persons to report all cases of suspected child battering seen by them.[64] The basic reporting provision is found in section 43-21-11 of Mississippi Code Annotated. This statute requires the persons listed therein to make a report whenever they have "reasonable cause to suspect" that a child brought to them for examination, care, or treatment or of whom they have knowledge through observation has been battered.[65] If one of these persons serves on the staff of a hospital or similar institution he is required to notify the person in charge of that institution or his designated delegate who is to make the report.[66] Also, the state department of public welfare must notify the appropriate court or law enforcement agency whenever it has "reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child . . . ."[67]

Section 43-21-11 also requires the reporting party to make an immediate oral report followed as soon as possible by a written report. Mississippi has a dual-reporting system which requires the party making the report to send a copy to the youth counselor designated by the judge of the youth court, and also to the county welfare department. The report must contain: (1) The names of the child and his parents or any other person responsible for his care, if these factors are known; (2) the age of the child; (3) the nature and extent of the child's injuries, including any evidence of previous injuries; and (4) any other evidence which might aid in establishing the cause of the injury or the identity of the perpetrator.[68]

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[61] MISS. CODE ANN. § 43-21-3 (Supp. 1975).

[62] *Id.*

[63] The statute defines a battered and abused child as:

> a child whose parent, guardian or custodian, or any person responsible for his care or support, has inflicted serious physical injury, including sexual abuse, or injuries other than by accidental means upon him as a result of abuse or neglect. In addition to physical injury, abuse encompasses a situation in which a child's mental health has been adversely affected in some substantial way as determined by examination by competent mental health professionals.

Id. § 43-21-5(i).

[64] *Id.* § 43-21-11.

[65] *Id.*

[66] *Id.*

[67] *Id.* § 43-17-7 (1972).

[68] *Id.* § 43-21-11 (Supp. 1975).

In addition, section 43-21-11 provides protection from lawsuits for all persons required to report or participate in judicial proceedings under the statute. These persons will be presumed to have acted in good faith and are granted immunity from any civil or criminal liability that might result from their actions.

The court may also obtain information concerning the welfare of a child on its own initiative. A two-tiered technique is authorized for gathering this information. The court may make a preliminary inquiry to determine if it is in the interest of the child to take further action. If additional action is necessary the court may authorize "the public welfare department, any successor agency, or any suitable public employee to make a social investigation concerning the child . . .", and submit the findings to the court.[69]

State intervention into the parents' custodial rights over the child without prior judicial approval is authorized by four different provisions in the Youth Court Law. Three of these provisions for intervention are found in section 43-21-11. Under this statute the court may make "an informal adjustment for the best interests of the child." This provision is limited by the requirement that permanent removal of the child from its natural parents or those with legal custody is prohibited except by the normal procedure initiated by filing a petition.[70] Another means of state intervention under this statute occurs where the child's parent or the person with legal custody of the child enters into a voluntary custodial agreement with the state department of public welfare. Such agreements are limited to temporary custodial changes and are subject to approval and modification by the youth court.

The very nature of child abuse often requires rapid action to remove a child from a threatening situation. Expedited procedures are authorized under two statutes.[71] No prior consultation with the youth court is necessary if "urgent and necessitous circumstances" require immediate action.[72] The state department of public welfare, in such situations, may take custody of the child from a parent or person with legal custody. However, the welfare department must immediately file a report with the youth court concerning the circumstances surrounding the taking of the child. Within 5 days of the taking of the child the welfare department must also file a petition providing information about the child, his parent or custodian, as well as facts which bring the child within the

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[69] *Id.*

[70] *Id.* The procedure for the termination of a parent's custodial rights will be discussed in a later portion of the text.

[71] *Id.* §§ 43-21-11 (Supp. 1975), 43-21-13 (1972).

[72] Cases involving alleged mental abuse are exceptions to the rule. *Id.* § 43-21-11 (Supp. 1975).

purview of the court. Alternatively, when it appears from the petition that the child's welfare requires prompt assumption of custody by the court, the youth court judge may simply write an order on the summons authorizing the serving officer to take immediate custody of the child, and the court will retain supervisory custody until the case is adjudicated.

Once the child's safety is procured and sufficient evidence of alleged child abuse has been acquired, the actual adjudication may proceed. Section 42-21-11 provides guidelines for the initiation of the action by a sworn petition filed with the youth court containing: (1) The name, age, sex, race, and residence of the child; (2) the name and residence of his parents or guardian, or if this information is unknown this fact should be stated; (3) the name and residence of the person having custody or control of the child if this person is not the parent or the guardian; and (4) the facts which bring the child within the purview of the Youth Court Law.

In Mississippi, youth court proceedings are considered special civil actions with rules commensurate with this status.[73] The general public is excluded from youth court hearings; a provision essential to child abuse proceedings as a means of assuring a climate conducive to rehabilitation of both abuser and victim. The statute also allows anyone interested in the hearing to appear with counsel at his own expense. This unfortunately appears to be the sole statutory provision concerning right to counsel in youth court proceedings.[74]

Two other sections in the Youth Court Law should also be noted because of their impact on evidentiary matters before the court. The first allows the court, on its own motion, to authorize a physical and mental examination of any child coming within its jurisdiction.[75] The court is, therefore, not required to depend on medical reports submitted by one of the parties. The other section abrogates the physician-patient privilege, allowing a more encompassing evidentiary hearing.[76]

After the judicial hearing, if it finds the child to have been battered, the court makes a decree to this effect.[77] At this point guided by what it

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[73] *Id.* § 43-21-17.

[74] *In re* Gault, 387 U.S. 1 (1967), has been interpreted to require counsel for minors only in juvenile delinquency proceedings. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 532 (1971); Carver & White, *Constitutional Safeguards for the Juvenile Offender, Implications of Recent Supreme Court Decisions*, 14 CRIME & DELIN. 63, 65 (1968); Comment, *In re Gault: Children Are People*, 55 CALIF. L. REV. 1204, 1206 (1967).

The latest amendment to the Mississippi statute specifically forbids the state department of public welfare from employing private counsel in child abuse proceedings. MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[75] MISS. CODE ANN. § 43-21-23 (1972).

[76] *Id.* § 43-21-27(f) (Supp. 1975).

[77] *Id.* § 43-21-19 (1972).

deems to be "for the best interest of said child," the court may dismiss the petition,[78] relinquish its jurisdiction over the matter, or change the custody of the child. If the court determines that an alteration in the custodial status will benefit the child, it has three options. The least radical change would be for the court to order supervision of the child in his own home. However, the child may also be placed in a suitable foster home, approved private institution, or agency. If the court orders placement of the child in a foster home, private institution, or agency, it may also order the child's parents or legal guardian to pay the expenses.[79]

Although section 43-21-19 authorizes a custodial change for the child and section 43-21-11 provides for a permanent custodial modification, the youth court apparently lacks the power to terminate parental rights. Separate proceedings must be instituted in chancery court by "any person, agency, or institution" whenever "the parent or parents of a child have abandoned or deserted such child, or are mentally, morally, or otherwise unfit to rear and train such child . . . ."[80] Before the petition may be filed to obtain termination of parental rights, authority must be granted by the "chancery court or chancellor in vacation."[81] This authorization would rarely be denied after the youth court judge has rendered a decree finding a particular child to have been battered. The same would be true if the state through one of its agencies was instituting this action under the *parens patriae* doctrine for the benefit of the child. Under section 93-15-5, the chancellor at his discretion may appoint a guardian *ad litem* to protect the interests of the child.[82] If the chancellor finds the parent or parents have abandoned or deserted the child, or finds one or both of them to be unfit, the court may order termination of parental rights.[83] If the rights of the natural parent or parents have been terminated, the court may place the child in the custody of a "suitable person, agency or institution."[84] The person,

[78] It is not known what effect dismissing the petition after adjudication of the matter will have, but section 43-21-19 explicitly includes this alternative. *Id.*

[79] *Id.* § 43-21-21.

[80] *Id.* §§ 93-15-1 to -11. This action can be brought in the chancery court of the county where the child is found, or in the county where the parents reside or can be found. *Id.* § 93-15-1.

[81] *Id.* § 93-15-1.

[82] The Law now provides for the appointment of a guardian *ad litem* in every case involving an abused or neglected child. *Id.* § 43-21-17 (Supp. 1975). By appointing an attorney as guardian *ad litem* this provision could possibly be utilized to secure court-appointed counsel for the child. See notes 89 & 90 and accompanying text *infra*.

[83] MISS. CODE ANN. § 93-15-7 (1972). The parental rights of one parent may be terminated without affecting the parental rights of the other parent. *Id.*

[84] *Id.* § 93-15-9.

agency, or institution with whom the child is placed has authority to consent to adoption without notice given to the parents.[85]

However, the youth court does have ancillary powers in matters related to the child abuse proceeding. Under the authority of section 43-21-25 the court may order any person "found by the court to be encouraging, causing or contributing to the neglect . . . or battering of such child . . . to do or omit to do any act or acts which the judge may deem reasonable and necessary for the welfare of such child." Compliance with court orders will be enforced with the contempt powers.[86]

C. Hinds County Youth Court

One jurisdiction within the State of Mississippi, presently providing court-appointed counsel for the battered child, is the Hinds County Youth Court located in Jackson, Mississippi.[87] The following section is a summary of the procedures used by that court to provide adequate legal protection of the child's interest in child abuse proceedings.

The Youth Court of Hinds County, Mississippi has two or three cases of suspected child abuse reported to it each month. The average age of the child involved is 2 years. Two-thirds of these reported cases result in confirmation of abuse. Very few cases are referred to the Hinds County Grand Jury for criminal indictment; rather, psychiatric treatment is preferred since most child abusers were battered children themselves.[88]

Counsel is always appointed to represent the interests of the child in the Youth Court of Hinds County under a contract between the Hinds County Board of Supervisors and Mississippi Bar Legal Services, Inc., Jackson, Mississippi.[89] Under the terms of the contract, Mississippi Bar Legal Services, Inc. provides representation for juveniles brought before the youth court in any and all types of proceedings.[90] The philosophy

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[85] *Id.*

[86] An offender may be fined up to $500 and imprisoned not more than 90 days. *Id.* § 43-21-25.

[87] The authors wish to thank the Honorable Carl E. Guernsey, Judge, Hinds County Youth Court, Jackson, Mississippi, and the Honorable Joseph Wroten, Judge, Washington County Youth Court, Greenville, Mississippi, for their assistance in preparing this summation.

[88] Interview with the Honorable Carl E. Guernsey, Judge, Hinds County Youth Court, in Jackson, Mississippi, March 26, 1975, at 1 (transcript on file with *Mississippi Law Journal*) [hereinafter cited as Guernsey Interview].

[89] *Id.* at 3.

[90] A different approach is taken in the Washington County Youth Court, in Greenville, Mississippi. An experienced attorney is provided for the child in all youth court proceedings under the authority of section 43-21-43 of the Youth Court Law, which permits a judge, with approval of the board of supervisors, to appoint one or more persons from a list provided by the state merit system to serve as "youth counselors". Interview

behind the establishment of such a program is a uniformly held belief among judges and attorneys working in the Hinds County Youth Court that the child has a right to be represented in the procedures and protected from an abusive parent.[91]

There is no set rule as to when in the proceedings counsel is notified. Generally speaking, in a case in which an emergency order has been signed by the youth court judge, the designated youth counselor will notify counsel as soon as the child is removed from the parent's home. In other instances counsel may be notified when the date of the hearing is placed on the docket, or at least 3 days before the hearing.

The role of the court-appointed counsel in the child abuse proceeding is similar to that of a guardian *ad litem*.[92] In conjunction with these duties, counsel appointed to represent the interest of the child talks to both the county prosecuting attorney and the youth counselor who has compiled the investigative report on the suspected battered child. If the data obtained from these sources is deemed insufficient by counsel, a request can be made to the court for more data. During the course of the hearing, the attorney will often question the parents of the child about their concept of corporal punishment and the severity with which they believe it may be administered. The attorney also assists in the determination of a suitable placement for the child if the outcome of the hearing is removal of the child from the custody of its parents.

Reporting to the youth court instances of suspected child abuse in Hinds County is most frequently made by medical personnel at the University of Mississippi Medical Center in Jackson, Mississippi. This is primarily because the University Hospital is a state institution.[93] The examining physician is required to complete a "Report of Suspected Battered Child," and the designated counselor at the youth court is notified, sometimes jointly by the social services division of the hospital and the pediatrics division.

The process after notification by medical personnel is for the youth court to make preliminary inquiry determining whether the interest of the child or the public requires the court to take further action. This preliminary inquiry is common to delinquency and neglect proceedings as well. The report leads to an investigation from which the court determines whether a petition should be heard.[94]

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with the Honorable Joseph Wroten, Judge, Washington County Youth Court, in Greenville, Mississippi, April 4, 1975 (transcript on file with *Mississippi Law Journal*).

Section 43-21-17 may restrict use of this method of providing legal counsel since the youth counselors are to be appointed from within the merit system set up by the state department of public welfare. *See* note 3 *supra*.

[91] Guernsey Interview, *supra* note 88, at 3.

[92] *Id.*; see MISS. CODE ANN. § 93-15-5 (1972).

[93] *See* text accompanying notes 64 through 67 *supra*.

[94] Guernsey Interview, *supra* note 88, at 1.

The youth counselor will notify the county welfare department of the report. The counselor will also go to the hospital and examine the hospital records. He must personally observe the child and list the injuries found if a request for an emergency order is to be made. The circumstances which caused the child to be injured and the names and addresses of the persons involved are also included in the investigative report of the youth counselor. If the parents of the child are present at the hospital, they are advised of their rights, and if they so desire, can tell the youth counselor their version of the facts.

After considering reports from the youth counselor and the attending physician, and being informed that there is probable cause to believe that the child is a battered child within the purview of the Youth Court Law, the judge may, if he deems it necessary, sign an emergency order placing the child in the care and custody of the Hinds County Welfare Department for placement in a suitable relative's or foster home until a hearing can be held. The emergency order must set forth the nature of the child's injuries and their confession. The emergency order effectively gives the director of the county welfare department all the rights of a parent to consent to any medical treatment deemed in the best interest of the child.

While the Youth Court Law permits an informal adjustment for the best interest of the child without a petition,[95] usually such an informal adjustment will not be acceptable where a battered child is involved.[96] However, a voluntary consent order in lieu of a formal hearing may be accepted.[97] By the voluntary consent order, the parent or parents agree to have their home investigated by the county welfare department. Although primarily for home investigation purposes, the consent order can include agreements by the parents to make psychiatric appointments, to provide a clean home environment, to get a job, or even to get married—if in the best interest of the child.

Normally, an order is directed to the youth counselor authorizing and directing the counselor to file in the youth court a sworn petition setting out the alleged acts of abuse based on information and belief. The petition may allege neglect as well as abuse. Since the average age of the child in child abuse cases is 2 years and, therefore, the child is not a competent witness, and since a husband and wife are not required to testify against each other, a stalemate as to who is "the guilty party" is often reached.[98] Thus, neglect is often easier to prove. As to proof of battering, the Youth Court Law refers to "serious physical injury"[99]

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[95] MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[96] Guernsey Interview, *supra* note 88, at 1.

[97] *Id.*; *see* MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[98] Guernsey Interview, *supra* note 88, at 1.

[99] MISS. CODE ANN. § 43-21-5(i) (Supp. 1975).

though it does not define the types of injuries which would qualify. However, moderate bruises and burns, as well as more severe injuries such as broken bones, appear to meet the proof required by the act.[100]

After the filing of the petition, a summons is issued to the parent or parents stating the date, time, and place of the hearing. The usual court make-up at the hearing on the petition consists of the judge, the court reporter (a full transcript is made of any case heard on petition), the court-appointed counsel for the child, the county prosecuting attorney or district attorney, the youth counselor, the county welfare social worker, the parents (who may be represented by counsel), and witnesses. While it is the usual procedure to have the child present at the hearing, most of the evidence introduced at the hearing to substantiate injuries is of a photographic nature.[101] At this hearing the parent or parents are required to show cause why the child should not be adjudged a battered child.[102]

If the allegations in the petition are admitted by the parent or parents, a dispositionary hearing is held to decide what is to be done for the child. The child's counsel then will seek a suitable home situation in which to place the child. If the allegations are denied, however, a full evidentiary hearing is held.

If the child is adjudged a battered child, an order is entered to that effect. If the child is to be removed from his home, he will usually be placed with the county welfare department or a relative. The provisions of the order, in the usual case, will include monitoring by the county welfare department, with close surveillance during the first 2 weeks following the hearing. Although the court does not often order specific reporting by the welfare department, continuing review, social investigation of the home, and psychiatric care of the parents are part of the usual order.[103] In extreme cases, a directive will order that proceedings to terminate the parents' right to custody be initiated in the chancery court. Where criminal prosecution of the parents is indicated, the order may also require the entire file to be sent to the district attorney.

At the present time, there is no procedure in the Hinds County Youth Court for monitoring the battered child in placement, although the need for such a procedure is recognized.[104] Before a petition to return

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[100] Guernsey Interview, *supra* note 88, at 1.

[101] *Id.* at 1. In most cases the child is too young to be a competent witness.

[102] While the petition filed in the youth court initiates the civil proceedings in which the child's rights are settled, the county district attorney may swear out a general affidavit against the suspected child abuser. If such an affidavit is sworn out, a summons is issued for the person so named to answer the criminal charges lodged against him before the county court. *Id.* at 2-3.

[103] *Id.* at 2.

[104] *Id.* at 3.

the child to its home will be considered, the parent must show that he or she has undergone psychiatric treatment, and a favorable report of changed circumstances must be forthcoming from the assigned social worker.[105]

D. *Criminal Provisions*

The Mississippi child abuse law has two criminal provisions which are distinguishable by the severity of abuse as well as the degree of *mens rea* necessary for each offense.[106] The misdemeanor provision provides that any "person who willfully commits any act or omits the performance of any duty . . . which . . . results in the abuse and/or battering of any child . . ." has committed the offense.[107] The syntax of this provision suggests the possible imposition of criminal liability on persons other than the abuser. This subsection is not distorted by an interpretation which imposes criminal sanctions on a party whose failure to report a prior instance of suspected abuse, an omission of the performance of a statutory duty,[108] results in a subsequent battering of the child.[109] Such an interpretation is urged for no other reason than to compel compliance with the reporting requirement.[110]

Prior to the 1975 amendments, the felony provision required premeditated design before it could be invoked.[111] Now only an intentional action, such as burning, torturing, beating, or whipping, is required, thus lessening the degree of *mens rea* necessary for conviction.[112] In addition, physical abuse to the extent of fractures, mutilation, disfigurement, or destruction of any part of the body of a child under 18 years of age is also a prerequisite for utilization of this provision.[113] A conviction of felonious battery of a child under this statute permits imprisonment of the offender for up to 20 years. Subsection (c) of the same

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[105] *Id.*

[106] MISS. CODE ANN. § 43-21-27 (Supp. 1975).

[107] *Id.* § 43-21-27(a). This provision permits imprisonment for up to 6 months and imposition of a fine up to $500.

[108] This duty to report is delineated in *id.* § 43-21-11 (Supp. 1975). *See* text accompanying notes 64 through 67 *supra*.

[109] Child abuse in most instances occurs in a repetitive sequence. A settlement of a $600,000 trust fund was recovered by the father of a battered child who suffered severe brain damage as a result of repeated unreported abuse. Four doctors who treated the child but did not report the abuse were sued, as was the police chief who failed to investigate adequately. TIME, Nov. 20, 1972, at 70. *See also* Kahlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CALIF. ST. B.J. 119 (1974).

[110] Threat of a civil suit such as described in note 109 *supra*, would provide needed additional motivation for the applicable personnel to make the required report.

[111] Act of April 12, 1973, ch. 469, [1973] Gen. Laws Miss. 624.

[112] MISS. CODE ANN. § 43-21-27(b) (Supp. 1975).

[113] *Id.* The amendments raised the age provision from 13 to 18. *Id.* § 43-21-5(c).

section requires the youth court judge to report any suspected violation of the felonious battery of a child provision to the grand jury.

IV. COURT-APPOINTED COUNSEL: A PROPOSAL

Realistic and effective reform of child abuse proceedings in Mississippi can best be attained by providing court-appointed counsel to the child-victim as well as the indigent parent or parents accused of battering the child.[114] Although the right to counsel has traditionally been limited to criminal[115] or quasi-criminal proceedings,[116] the due process logic of this right is equally applicable to child abuse and termination proceedings. Furthermore, in Mississippi, a state of limited resources, implementation of this needed reform would be placed on the bar, the segment of society perhaps best able to carry the burden of this reform. The need for representation by counsel was succinctly stated by Justice Fortas in *Kent v. United States:* "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."[117] In the context of the lack of understanding of the child abuse phenomenon not only in Mississippi but throughout the United States, it is submitted that only by assuring the adequate representation of all parties will the child's best interest be protected.

A. The Child's Right to Counsel

There are two basic reasons for recognition of a child's right to counsel. First, when the state invades the family unit through the *parens patriae* doctrine and conducts a judicial examination of family relations, with the implicit power of changing the custody of a child, the due process clause of the fourteenth amendment requires representation by counsel as a prerequisite to a fair hearing. The second reason for recognition of the abused child's right to counsel is that "the best interest of the child,"[118] the theoretical guideline for all child-related judicial

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[114] This includes the right of indigent parents to have court-appointed counsel in proceedings to terminate parental rights resulting from a child abuse adjudication. *See id.* § 93-15-1 to -11 (1972).

[115] Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

[116] Kent v. United States, 383 U.S. 541 (1966). Despite statutory assertions that delinquency proceedings are civil in nature, MISS. CODE ANN. § 43-21-17 (Supp. 1975), they often result in loss of liberty, *id.* § 43-21-19 (1972), and in many situations these cases can be transferred from a juvenile court to a regular court for criminal prosecution of the defendant. *Id.* § 43-21-31.

[117] 383 U.S. at 561.

[118] *See* MISS. CODE ANN. §§ 43-21-11 (Supp. 1975), 43-21-19 (1972).

proceedings,[119] cannot be adequately ascertained without independent representation of that child's interest.

The due process rationale for providing children with counsel in child abuse and termination proceedings is derived from *In re Gault*.[120] In that case, 15-year-old Gerald Gault was charged with making a lewd phone call and summarily sentenced to commitment in the state industrial school "for the period of his minority [that is, until 21], unless sooner discharged by due process of law."[121] The maximum sentence for an adult committing the same offense was a $50 fine or 2 months imprisonment.[122] In regard to the child's right to counsel the Supreme Court held:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[123]

Although this holding is limited to delinquency cases in which there is the possibility of restriction of the liberty of the juvenile, the due process rationale is equally applicable to the battered child. As previously stated, the welfare of the child has traditionally been protected by the state in judicial proceedings through the doctrine of *parens patriae*.[124] State supervision of the child's well-being is commonly asserted as adequate protection of the child's interest.[125] However, New Jersey Supreme Court Chief Justice Arthur Vanderbilt's observations on the necessary elements of due process effectively silence such arguments:

> In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. The indispensible elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to

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[119] *See* text accompanying notes 29 through 32 *supra*.

[120] 387 U.S. 1 (1967).

[121] *Id.* at 7-8.

[122] *Id.* at 9.

[123] *Id.* at 41.

[124] *See* Comment, *The Conflict of Parens Patriae and Constitutional Concepts of Juvenile Justice*, 6 LINCOLN L. REV. 65 (1971).

[125] *See* Nicholas, *History, Philosophy and Procedures of Juvenile Courts*, 1 J. FAM. L. 151 (1961).

> revert, in spite of good intentions, to the more primitive days when he was treated as a chattel.[126]

The "fair hearing" requirement of the due process clause mandates appointed counsel for children in child abuse proceedings. This "fair hearing" requirement has been held to have been denied persons forced to defend themselves without the assistance of counsel in criminal proceedings.[127] Since the right to counsel as an adjunct to a fair trial is based on the incompetence of the laymen to protect his interests in a judicial proceeding,[128] an even stronger argument can be made concerning a child's inability to protect his interest or even make his interests known in a child abuse or termination proceeding without the aid of counsel. It might be asserted that there is a crucial difference between child welfare proceedings in which there is no requirement of representation by counsel, and criminal or delinquency proceedings which recognize a right to counsel, since, in the latter case defendants are subject to loss of liberty. In Mississippi, however, a child may be committed to an institution or agency and just as effectively deprived of freedom in both child abuse[129] and termination proceedings.[130]

Thus, in view of the fact that *Kent* and *Gault* guaranteed due process protection, including the right to counsel for juveniles in delinquency proceedings, it would be consistent for a dynamic judicial system to extend these protections to all judicial proceedings involving children.[131]

An integral part of the need for counsel in child welfare proceedings is the belief that the best interest of the child cannot be realistically determined without his independent representation. The independent representation of a child by counsel in all proceedings in which his welfare or disposition is at stake has been called "the most significant and practical reform that can be made in the area of children and the law."[132] Counsel for a child in child abuse, termination, and custodial proceedings ideally functions in two roles: guardian and advocate. As the child's guardian, counsel must ascertain where the best interests of his client lie. As the child's advocate, counsel must exert his efforts to

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[126] *In re* Gault, 387 U.S. 1, 19 n.25 (1967), *citing* Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey in the foreword to M. VIRTUE, BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN (1953).

[127] Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama 287 U.S. 45 (1932).

[128] Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963), *citing* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[129] MISS. CODE ANN. § 43-21-19 (1972).

[130] *Id.* §§ 93-15-7, -9.

[131] Inker & Perretta, *supra* note 26, at 113.

[132] Foster & Freed, *supra* note 29, at 356.

secure disposition in accordance with his findings.[133] Independent counsel provided for the child allows the court to see and review evidence which would not be revealed pursuant to the usual form of partisan advocacy existing between the parents and the state.[134] When a child, not independently represented by counsel, is the subject of a judicial proceeding his future will effectively be determined by facts presented by his parents,[135] or those provided by the state under its *parens patriae* obligation. Such a situation can only result in the child being treated as a chattel, often with tragic results.

Although independent representation by counsel for a child in child welfare proceedings has received scant attention at the federal appellate court level,[136] many states allow an absolute or discretionary right to counsel for the child.[137] Mississippi could only benefit by moving into the category providing an absolute right to counsel.[138] Although directed at delinquency proceedings, a statement by the President's Crime Commission is equally applicable to child welfare proceedings:

> The Commission believes that no single action holds more potential for achieving procedural justice for the child in juvenile court than provision of counsel . . . .
>
> . . . And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances.[139]

The Commission then recommended:

> Counsel should be appointed as a matter of course wherever coer-

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[133] 58 CORNELL L. REV. 177, 186-87 & n.48 (1972).

[134] Inker & Perretta, *supra* note 26, at 111.

[135] For all practical purposes the court must decide the future of the child only on the basis of facts presented by the state because of the vested interest most parents have in retaining custody of their child. A recent article on the rights of parents advises attorneys that "the lawyer should always strive to show the best interests of the child would be served by awarding the child to his client (the natural parents)." Veverka, *The Right of Natural Parents to Their Children as Against Strangers: Is the Right Absolute?* 61 ILL. B.J. 234, 239 (1973).

[136] *See* Heyford v. Parker, 396 F.2d 393 (10th Cir. 1968); McDaniel v. Shea, 278 F.2d 460 (D.C. Cir. 1960); *In re* Custody of a Minor, 250 F.2d 419 (D.C. Cir. 1957).

[137] 58 CORNELL L. REV. 177, 181-82 (1972).

[138] Mississippi is presently listed in the "No statutory right to counsel" category. *Id.* at 183 n.33.

[139] REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86 (1967).

cive action is a possibility, without requiring any affirmative choice by child or parent.[140]

B. *Parental Right to Counsel*

The rationale for providing court-appointed counsel to indigent parents involved in child welfare proceedings parallels that of court-appointed counsel for a child. However, there are significant differences that suggest an even stronger case for court-appointed counsel for parents. The most apparent difference is that, when child welfare proceedings are initiated, the parent is placed in an adversarial role against the force of the state. He is in a precarious situation as a defendant who is in danger of losing custody of his child, and in some cases actually facing criminal charges. In all probability the court's natural sympathies lie with the child rather than the parent. As a result the defendant parent is often left to his own devices to protect his judicially recognized right to raise his children as he sees fit.[141]

It would appear that a reasonable application of the due process clause of the fourteenth amendment to child welfare proceedings would guarantee an indigent parent the right to court-appointed counsel. Implicit in any requirement to provide counsel is recognition of a significant legal interest that warrants the protection afforded by legal representation.[142] This legal interest is the right of parents to have and raise children under their personal supervision.[143] In *Meyer v. Nebraska*[144] the Supreme Court said this parental right is a "liberty" which cannot be deprived a person without due process of law. Thus, it should be apparent that the due process requirement of a fair hearing cannot be achieved unless the indigent parent is provided with court-appointed counsel.[145] The failure to provide court-appointed counsel in child abuse and related proceedings effectively denies the indigent parent the right fully to participate in litigation involving his fundamental rights.[146]

At the present time the courts of relatively few jurisdictions have recognized the right of indigent parents to have court-appointed coun-

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[140] *Id.* at 87.

[141] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[142] Comment, *Indigent Parents in Juvenile Proceedings: The Right to Appointed Counsel*, 1969 LAW AND THE SOCIAL ORDER 467, 474 (1969).

[143] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[144] 262 U.S. 390, 399 (1923).

[145] Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[146] 1 HOFSTRA L. REV. 324, 329-30 (1973), *citing* Stanley v. Illinois, 405 U.S. 645 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971).

sel,[147] but the trend seems to be in that direction.[148] It is hoped that in Mississippi the state supreme court or the legislature will modify the procedure of child welfare proceedings to provide court-appointed counsel for children and indigent parents. Such action would go far in attaining an informal and intelligent adjudication of all such proceedings with the greatest protection for the rights of all parties.

David O. Bell
William N. Graham
Frankie Walton White

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[147] *See* Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973); *In re* Friesz, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); State v. Jamison, 251 Ore. 114, 444 P.2d 15 (1968); *In re* R.I., 455 Pa. 29, 312 A.2d 601 (1973); *In re* Welfare of Luseier, 84 Wash. 2d 135, 524 P.2d 906 (1974).

[148] *See* Comment, *supra* note 142, at 474.

RECENT DECISIONS

CONSTITUTIONAL LAW—JUVENILE RIGHTS—DOUBLE JEOPARDY CLAUSE BARS CRIMINAL PROSECUTION OF JUVENILE SUBSEQUENT TO ADJUDICATION OF DELINQUENCY IN JUVENILE COURT

Seventeen-year-old Gary Jones petitioned for a writ of habeas corpus in the United States District Court for the Central District of California,[1] seeking relief from an armed robbery conviction rendered by a California superior court.[2] Jones alleged that his trial in the superior court placed him in double jeopardy as jeopardy had attached at his prior hearing in the Juvenile Court of the County of Los Angeles.[3] The district court denied the petition, concluding that jeopardy had not attached in the juvenile proceeding; and alternatively, even if jeopardy had attached, no new jeopardy arose by certifying Jones to be tried as an adult.

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[1] Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972).

[2] Jones had exhausted his state remedies by unsuccessfully petitioning a California court of appeals for a writ of habeas corpus prior to his conviction in the superior court. *In re* Gary Steven J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (2d Dist. Ct. App. 1971). On August 4, 1971, the California Supreme Court refused to hear the petition. Breed v. Jones, 95 S. Ct. 1779, 1783 (1975).

[3] Jones' conviction came in the form of a finding that he was a person described by CAL. WELF. & INST'NS CODE § 602 (West 1966), which, at the time Jones filed his petition, provided:

> Any person under the age of 21 years who violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

At a subsequent proceeding the juvenile judge decided that Jones was not amenable to rehabilitation in the juvenile system and directed the district attorney to prosecute Jones as an adult. This procedure was followed pursuant to CAL. WELF. & INST'NS CODE § 707 (West 1966), which provided in part:

> At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, . . . the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order that the other court proceedings resume.

For a comprehensive discussion of California's system of jurisdictional waiver of juveniles, see Clayman, *Fitness—The Critical Hearing of the Juvenile Court*, 50 L.A.B. BULL. 133 (1975); Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Court*, 24 STAN. L. REV. 874 (1972).

The United States Court of Appeals for the Ninth Circuit reversed, upholding Jones' contention.[4] On writ of certiorari the United States Supreme Court, *held*, vacated and remanded.[5] When a minor is tried in juvenile court, a second trial for the same offense in adult court violates the double jeopardy clause of the fifth amendment. *Breed v. Jones*, 95 S. Ct. 1779 (1975).

The exact origin of the double jeopardy clause is unclear,[6] but the protection against double jeopardy was expressed to a limited extent in the Digest of Justinian.[7] The plea was recognized at common law[8] and ultimately found expression in the Consitution.[9] The double jeopardy clause has afforded a variety of protections,[10] one of which precludes a state[11] from prosecuting any person twice for the same offense.[12] The clause is "cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict,"[13] because a trial is an "ordeal"[14] in which the defendant "must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well."[15] A defendant may, however, be tried again for the same offense if he obtains the reversal of a conviction by his own

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[4] Jones v. Breed, 497 F.2d 1160 (9th Cir. 1974).

[5] The Court actually sustained the Ninth Circuit on the double jeopardy issue, but Jones had reached age 21 and could not be dealt with by the juvenile court as the Ninth Circuit had ordered. Breed v. Jones, 95 S. Ct. 1779 (1975).

[6] At least one court announced that the doctrine may have had no origin at all:

> It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed.

Stout v. State, 36 Okla. 744, 756, 130 P. 553, 558 (1913).

[7] Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963).

[8] For a discussion of the common law development of double jeopardy, see *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 262 n.1 (1965).

[9] U.S. CONST. amend. V provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[10] *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (prohibiting reprosecution following premature termination of a trial); United States v. Ball, 163 U.S. 662 (1896) (prohibiting reprosecution following an acquittal); *In re* Nielson, 131 U.S. 176 (1889) (prohibiting reprosecution following a conviction). *See also* Note, *supra* note 8.

[11] The double jeopardy clause's prohibition was held applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969), *noted in* 24 ARK. L. REV. 110 (1971); 23 VAND. L. REV. 835 (1970). *See generally* Comment, *Benton v. Maryland: A Further Extension of the Rights of the Individual in Criminal Proceedings*, 18 U. KAN. L. REV. 309 (1970).

[12] *See, e.g.*, Green v. United States, 355 U.S. 184 (1957); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[13] Price v. Georgia, 398 U.S. 323, 331 (1969). This language is very close to that used by the Court in United States v. Ball, 163 U.S. 662, 669 (1895):

> The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

[14] Price v. Georgia, 398 U.S. 323, 331 (1969).

[15] *Id.* at 331 n.10.

appeal.[16] This second trial has been justifed on two grounds: Either the appellant waives his former jeopardy by seeking reversal of the conviction,[17] or the second trial is merely a continuance of the same jeopardy which attached in the first trial and does not end until the accused is acquitted or his conviction becomes final.[18] However, the protection afforded adults against double jeopardy, like other constitutional protections,[19] was long denied to minors.[20] Ironically, these denials resulted from the fatherly approach of the juvenile courts,[21] as engendered by the peculiar evolution of the juvenile justice reform movement[22] and its attendant doctrine of *parens patriae*.[23] In 1966 a new round of

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[16] United States v. Ball, 163 U.S. 662 (1895).

[17] *See, e.g.*, Wade v. Hunter, 336 U.S. 684, 688 (1948); Brewster v. Swope, 180 F.2d 984, 986 (9th Cir. 1950).

[18] *See, e.g.*, Kepner v. United States, 195 U.S. 100, 134-37 (Holmes, J., dissenting) (1904); State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937).

[19] *See, e.g.*, People *ex rel.* Weber v. Fifield, 136 Cal. App. 2d 741, 289 P.2d 303 (1st Dist. Ct. App. 1955) (right to counsel); *In re* Magnuson, 110 Cal. App. 2d 73, 242 P.2d 362 (3d Dist. Ct. App. 1952) (right to bail pending appeal); *In re* Perham, 104 N.H. 276, 184 A.2d 449 (1962) (right to jury trial); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *appeal dismissed*, 289 U.S. 709 (1933) (privilege against self-incrimination); *In re* Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954) (admission of hearsay evidence). *See also* Kent v. United States, 383 U.S. 541, 542 (1966); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967).

[20] *See, e.g.*, Cooper v. District of Columbia, 363 U.S. 847 (1960); Bryan v. Superior Court, 7 Cal. 2d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972) (en banc), *cert. denied*, 410 U.S. 944 (1973) (holding double jeopardy protections inapplicable to juvenile proceedings); State v. R.E.F., 251 So. 2d 672 (Fla. 1st Dist. Ct. App. 1971), *aff'd per curiam*, 265 So. 2d 701 (Fla. 1972); *Ex parte* Martinez, 386 S.W.2d 280 (Tex. Crim. App. 1964).

[21] The traditional approach utilized by juvenile courts has been geared toward rehabilitation of the child "through paternal advice and admonition." *In re* Gault, 387 U.S. 1, 25-26 (1967). One writer vividly described his idea of the paternal approach:

> The judge on a bench, looking down upon a boy standing at the bar, can never evoke the proper sympathetic spirit. Seated at a desk with a child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909). Nevertheless, because of the reformers' mixed attitudes of benevolence and open hostility toward the "little vagrants," this solicitous atmosphere probably never prevailed. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193-94 (1970).

[22] The juvenile court system sprang from the enlightened idea that delinquent children should be separated from hardened criminals. This idea received its impetus and became a reality due to the energetic optimism of the early reformers, who believed that evil was more readily learned in evil surroundings. *See* Fox, *supra* note 21.

[23] The essence of the doctrine is that the state is empowered to act in a parental role on behalf of the child. *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 173; Note, *Juvenile Law-Double Jeopardy*, 8 U. RICH. L. REV. 601, 602 n.7 (1974).

reform[24] began with *Kent v. United States*.[25] In *Kent* the United States Supreme Court interpreted the District of Columbia Juvenile Court Act provision for transfer of juveniles to adult court as requiring a full hearing and representation by counsel.[26] The Court declined to address the broad constitutional issues raised in *Kent*, choosing instead to base the opinion upon statutory construction of the Juvenile Court Act and upon decisions of the lower federal courts which had interpreted the Act.[27] Although the decision was criticized for this reason,[28] the Court confronted the constitutional issues soon afterwards in the landmark case, *In re Gault*.[29] The *Gault* opinion rejected "the 'civil' label of convenience which [had] been attached to juvenile proceedings"[30] and found them to be essentially criminal trials. The Court then enumerated certain constitutional rights to which a juvenile is entitled in delinquency hearings: (1) the right to timely notice of the charges; (2) the right to representation by counsel; (3) the right to cross-examine witnesses; and (4) the right to refrain from self-incrimination.[31] The opinion also contained sweeping dictum which indicated that other constitutional guarantees would be extended to juveniles in delinquency proceedings consistent with the concept of "fundamental fairness."[32] Indeed, when the Court decided *In re Winship*,[33] holding that proof beyond a

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[24] The first round of reform began in 1824 with the establishment of a House of Refuge for neglected and predelinquent children by the New York legislature. The second round began in 1899 with the passage of the Illinois Juvenile Reform Act. Fox, *supra* note 21, at 1193-95, 1207-12.

[25] 383 U.S. 541 (1966).

[26] The Court also held that under the act two other safeguards must be afforded: First, the juvenile's counsel should be allowed to review any social records before the court; second, the juvenile court should state the reasons for its decision in the record. *Id.* at 557.

The states have not responded uniformly to the juvenile delinquency problem. There is great disparity among the states in procedures for waiver of jurisdiction, requirements for representation by counsel, and public access to juvenile court records. *See* Note, *Juvenile Delinquents: The Policy, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 793, 796, 799 (1966). Therefore, the states were given little guidance by the Court's construction of the District of Columbia Juvenile Court Act.

[27] 383 U.S. at 556.

[28] *See, e.g.*, Paulsen, *supra* note 23, at 181.

[29] 387 U.S. 1 (1967), *noted in The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 171 (1967); 39 MISS. L.J. 121 (1967); *and* 20 VAND. L. REV. 1161 (1967).

[30] 387 U.S. at 50.

[31] *Id.* at 33-34, 41-56.

[32] "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

Id. at 18-19.

[33] 397 U.S. 358 (1970).

reasonable doubt was constitutionally required in juvenile proceedings,[34] it appeared that those due process rights accorded adults would inevitably be extended to juveniles.[35] The Court halted this expansion, however, in *McKeiver v. Pennsylvania*,[36] in holding that there is no constitutional right to a jury trial in delinquency proceedings. The *McKeiver* decision made it clear that "the Supreme Court is unwilling to grant juveniles accused of delinquent offenses all the constitutional rights accorded adults in criminal trials."[37] Yet *McKeiver* does not represent a contraction of juvenile rights as much as it illustrates a limitation upon those rights consistent with the "fundamental fairness" standard originally developed in the *Gault* and *Winship* decisions.[38] Fundamental fairness is to be achieved by weighing two seemingly conflicting alternatives: the extension of due process protections to juveniles and the preservation of the informal, non-adversary juvenile court procedures.[39] Implementing this approach in *Gault*,[40] the Court stated that "observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[41] *Winship* and *McKeiver* utilized the same approach[42] and, in doing so, established an analytical model aimed at maximizing the benefit to juveniles by pursuing the ideal of fundamental fairness. Articulation of this framework, however, did little to put to rest the double jeopardy issue in juvenile proceedings. Notwithstanding *Gault's* implicit approval of the position that it was unconsti-

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[34] Before *Winship*, many states adhered to the preponderance of the evidence standard in delinquency hearings. *See id.* at 360 n.3 (collecting cases).

[35] After *Winship*, several writers cautiously predicted the expansion of constitutional safeguards to juveniles. *See, e.g.*, 9 DUQUESNE L. REV. 673, 679-80 (1971); 46 NOTRE DAME LAW. 373, 388-89 (1971); 7 TULSA L.J. 63, 67 (1971); 16 VILL. L. REV. 352, 361-62 (1970).

[36] 403 U.S. 528 (1971).

[37] Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 270 (1972).

[38] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). *Contra, The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 113 (1971); 24 VAND. L. REV. 1281, 1287 (1971).

[39] 403 U.S. at 545, 550. *See also* Rudstein, *supra* note 37, at 275.

[40] In *Gault*, the Court relied on various studies and model legislative acts dealing with the juvenile process. In addition, the Court considered the extent to which various states already afforded the rights in question to juveniles. These data were used as input in applying the Court's analytical framework, and not as a primary tool of analysis. *In re* Gault, 387 U.S. 1, 21-30 (1967). *See generally* Rudstein, *supra* note 37, at 266, 275, 282; Note, *supra* note 23, at 608.

[41] 387 U.S. at 21.

[42] In *Winship* the Court concluded:

> Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process.

397 U.S. at 366 (footnote omitted). Likewise, in *McKeiver* the Court stated:

> The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system.

403 U.S. at 547.

tutional to prosecute a juvenile in an adult court after he had served part of a juvenile court's sentence,[43] the courts and commentators remained in conflict.[44] Of the three instances in which double jeopardy may arise in juvenile proceedings—criminal prosecution following adjudication of guilt and commitment to a corrective juvenile institution, waiver of jurisdiction by the juvenile court after adjudication of guilt,[45] and prosecution after dismissal of a delinquency petition[46]—legal writers agree only about the impropriety of the third. Conflict persists as to the other two.

In the instant case, the Court reasoned that since its prior decisions established that the double jeopardy clause is expressed in terms of risk of trial and conviction rather than in terms of punishment,[47] and since a trial subjects an individual to heavy personal strain in "marshalling his resources against those of the State,"[48] any exception to the clause's protection must be justified by the interests of the juvenile court system or by the interests of the juveniles themselves. The Court recognized that in the majority of cases its holding would require the determination to transfer a juvenile to adult court be made prior to any adjudicatory hearing. Futhermore, it acknowledged the added burden to be placed on the juvenile courts because of multiple proceedings, diminished flexibility, and increased formality.[49] Yet the Court found these burdens insufficient to warrant a juvenile being tried twice for the same offense. The Court pointed to the overwhelming majority of jurisdictions operating their juvenile justice systems successfully while requiring the transfer decision be made prior to an adjudicatory hearing.[50] Moreover, the Court noted that the increased burden on the juvenile courts would be partially canceled by the cases in which, because of transfer, no further juvenile proceedings would be required,[51] and in those cases in which the juvenile court decides not to waive its jurisdiction, it is more probable that a juvenile will admit the offenses charged, thus eliminating the need for an adversary hearing.[52] The Court rejected both alternative arguments

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[43] *In re* Gault, 387 U.S. 1, 20 n.26 (1967), *citing* Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965).

[44] Fain v. Duff, 488 F.2d 218 (5th Cir. 1973); Brown v. Cox, 481 F.2d 622 (4th Cir. 1973), *cert. denied sub nom.*, Brown v. Slayton, 414 U.S. 1136 (1974); and, Commonwealth *ex rel.* Freeman v. State Superintendent of Correctional Institutions, 212 Pa. Super. 422, 242 A.2d 903 (1968), extended the prohibition against double jeopardy to juveniles. For courts holding otherwise, see cases cited note 14 *supra*.

[45] *See, e.g.*, Rudstein, *supra* note 37, at 301-10; Note, *supra* note 3, at 884, 887-88 (advocating double jeopardy protection in juvenile proceedings). *Contra*, Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. Rev. 1, 24 (1974).

[46] *See, e.g.*, Rudstein, *supra* note 37, at 281; Comment, *Double Jeopardy and the Juvenile*, 11 J. Family L. 603 (1971); Note, *supra* note 3; Note, *Juvenile Court: Due Process, Double Jeopardy, and the Florida Waiver Procedures*, 26 U. Fla. L. Rev. 300 (1974); Note, *Double Jeopardy in Juvenile Justice*, 1971 Wash. U.L.Q. 702.

[47] See note 13 and accompanying text *supra*.

[48] Breed v. Jones, 95 S. Ct. 1779, 1787 (1975).

[49] *Id.* at 1789.

[50] *Id.* at 1790 & n.19.

[51] *Id.* at 1790.

[52] *Id.*

accepted by the district court. First, the Court looked past "the 'civil' label-of-convenience which has been attached to juvenile proceedings,"[53] recognized them as essentially criminal trials, and found that jeopardy did attach. The Court also rejected the "continuing jeopardy" argument, describing the phrase as a concept which "has never been adopted by a majority of this Court,"[54] and which is applicable to an entirely different procedural situation from the one presented by this case.[55]

The instant decision is likely to be well received, not only because it represents a further extension of due process protection to juveniles but also because the Court has reaffirmed its commitment to the juvenile court system as a separate entity with unique rehabilitative advantages. The decision's impact upon juvenile courts will probably be limited for two reasons. First, even before *Breed v. Jones*, most states required jurisdictional hearings prior to adjudication of delinquency.[56] Second, the decision added little to the *Gault* formula that due process denials must be justified by offsetting benefits which accrue to the child as a result of the uniqueness of the juvenile justice system. There is room, however, for a pessimist's speculation: The court may have introduced a troublesome element into the juvenile due process calculus not present in *Gault, Winship*, or *McKeiver*. That element is the increased administrative burden of a jurisdictional hearing. In raising this argument,[57] California forced the Court to shift from its analytical child-benefit approach to a balancing approach[58] in which interests of judicial efficiency are also considered.[59] The two approaches overlap. What is good for the juvenile may be good for the system, and vice versa, but it does not follow that measures which enhance the efficient operation of a judicial system necessarily constitute beneficial aspects of that system, at least not from the juvenile's point of view. Choosing between competing interests can be a much more difficult choice than deciding how best to serve the interests of a single group, though the Court had little difficulty with it here. In assessing California's administrative burden, the Court implied that *some* bur-

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[53] *Id.* at 1785, *citing In re* Gault, 387 U.S. 1, 50 (1967).

[54] 95 S. Ct. at 1788, *citing* United States v. Jenkins, 420 U.S. 358, 369-70 (1975).

[55] 95 S. Ct. at 1788.

> The conclusion, "continuing jeopardy," . . . has occasionally been used to explain why an accused who has secured the reversal of a conviction on appeal may be retried for the same offense.

Id., *citing* United States v. Wilson, 420 U.S. 332, 351-53 (1975); Price v. Georgia, 398 U.S. 323, 326 (1970); Green v. United States, 355 U.S. 184, 189 (1957).

[56] *See* Breed v. Jones, 95 S. Ct. 1779, 1788 n.14 (1975). *See also*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 19, at 24-25; Carr, *supra* note 45, at 21-22; Rudstein, *supra* note 37, at 297-300.

[57] Petitioner's Opening Brief at 35-50, Breed v. Jones, 95 S. Ct. 1779 (1975).

[58] *See* Comment, *A Balancing Approach to the Grant of Procedural Rights in the Juvenile Court*, 64 NW. U.L. REV. 87 (1969).

[59] If there is to be an exception to that [double jeopardy] protection in the context of the juvenile court system, it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens [of being tried twice].

Breed v. Jones, 95 S. Ct. 1779, 1788 (1975).

dens may justify due process denials.[60] This implication poses a serious question: Which burdens, of what quality and magitude, will justify disallowance of which due process rights to juveniles? The question is disturbing because heretofore "nowhere did [the Court] indicate that a child could be stripped of his constitutional rights through a balancing process."[61] Still, this interpretation may be inapposite, the result of reading *Breed v. Jones* too broadly. Perhaps those challenging the extension of due process rights to juveniles will be content to argue within the analytical framework established by *Gault*.

Michael Talmadge Lewis

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[60] *Id.* at 1789 & n.15. Much of the Court's opinion was devoted to weighing the difficulties imposed on California; yet the Court never explicitly foreclosed the possibility that an administrative burden could become so unbearable as to warrant due process denials. *Id.* at 1788-91.

[61] Rudstein, *supra* note 37, at 390 & n.111.

CONSTITUTIONAL LAW—DUE PROCESS—STATE STATUTE ALLOWING GARNISHMENT WITHOUT PRIOR NOTICE, OPPORTUNITY FOR HEARING, JUDICIAL PARTICIPATION, OR SHOWING OF NECESSITY VIOLATES THE FOURTEENTH AMENDMENT

Di-Chem, Inc. brought suit against North Georgia Finishing, Inc.[1] in the superior court of Whitfield County, Georgia, while simultaneously filing an affidavit and bond for garnishment[2] of the defendant's bank account. Prior to service of process, the clerk of the superior court issued a writ of garnishment. Three days after the writ was served, defendant posted the statutory bond which discharged the garnishment.[3] Defendant then moved to dismiss the writ and to discharge the bond, contending that the statutory procedure violated the due process and equal protection clauses of the fourteenth amendment.[4] After a hearing, the superior court overruled the motion. On writ of certiorari, the Georgia Supreme Court affirmed, holding that procedural due process, as applied to garnishment procedures, required notice and prior hearing only in wage garnishment proceedings.[5] On writ of certiorari the United States Supreme Court, *held*, reversed. When a state statute permits garnishment of a corporate bank account on conclusory allegations, without notice, opportunity for prompt hearing, or judicial participation, procedural due process is violated. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

The procedural rights which each person is due before being deprived of property through the judicial process were first considered by the United States Supreme Court over a century ago.[6] Relying upon principles of "natural" or "common" justice, these initial decisions required notice and an opportunity to be heard before a person might be dispossessed of property.[7] Only later, in cases considering the validity of tax assessments,[8] stockholders' liability for corporate debts,[9] and quasi-judicial administrative rulings,[10] was the protection of the fourteenth amendment invoked. In *Mullane v. Central Hanover Bank & Trust*

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[1] Di-Chem alleged a $51,279.17 indebtedness due and owing for goods sold and delivered. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 603-04 (1975).

[2] As required by Georgia statute, Di-Chem posted bond for twice the asserted indebtedness. The affidavit alleged: (1) the existence of the debt and (2) that Di-Chem had reason to apprehend loss of the amount owed unless garnishment issued. *Id.* at 604 & nn. 1-2. A separate statute provides generally for prejudgment garnishment but specifically precludes its use against the wages of residents. *Id.* at 602 n.1.

[3] *Id.* at 604 & n.1.

[4] U.S. CONST. amend. XIV, § 1.

[5] North Ga. Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E.2d 321 (1973), *rev'd*, 419 U.S. 601 (1975).

[6] Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863).

[7] *E.g.*, Windsor v. McVeigh, 93 U.S. 274, 277 (1876); Ray v. Norsworthy, 90 U.S. (23 Wall.) 128 (1874); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863) (prior to ratification of the fourteenth amendment).

[8] Central of Ga. Ry. v. Wright, 207 U.S. 127 (1907); Glidden v. Harrington, 189 U.S. 255 (1903).

[9] Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

[10] Southern Ry. v. Virginia, 290 U.S. 190 (1933).

Co.,[11] the Supreme Court explained that in proceedings "accorded finality . . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and . . . [of] an opportunity to present their objections" is required.[12] Since *Mullane*, the safeguards of notice and prior hearing have consistently been demanded before any final determination of property rights.[13] Ex parte seizures of property through prejudgment remedies[14] initially survived constitutional attacks, however, since such action was considered to be a temporary deprivation of property[15] and thus was not constitutionally cognizable. In fact, statutory prejudgment remedies were generally viewed as constitutional until the late 1960's.[16] Then, in *Sniadach v. Family Finance Corp.*,[17] a Wisconsin statute allowing nonjudicial garnishment of wages without notice or prior hearing was held violative of the fourteenth amendment's due process clause.[18] The Court stated that while such summary procedures might meet due process standards in exceptional circumstances,[19] no situation demanding special protection of the creditors' interests was presented.[20] Rather than finding the temporary nature of the deprivation controlling, the Court focused on the fact that wages are "a specialized type of property,"[21] garnish-

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[11] 339 U.S. 306 (1950), *noted in* 36 CORNELL L.Q. 541 (1951); *and* 50 MICH. L. REV. 124 (1951).

[12] 339 U.S. at 314.

[13] Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Armstrong v. Monzo, 380 U.S. 545, 550 (1965); Covey v. Town of Somers, 351 U.S. 141 (1956).

[14] Prejudgment remedies include attachment, garnishment, and replevin. In each of these an order is issued and enforced under state authority by seizing assets of the debtor prior to a ruling on the merits. Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 359, 365 (1973). Self-help remedies, generally viewed as lacking the requisite state action, raise questions apart from due process challenges. *But see* Hall v. Garson, 468 F.2d 845 (5th Cir. 1972).

[15] *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (due process does not require hearing prior to the seizure of misbranded drugs); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary assessment of delinquent taxes); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (attachment by creditors of defunct bank); Ownbey v. Morgan, 256 U.S. 94 (1921) (requiring attachment defendant to give security for the discharge of attached property as condition precedent to opportunity to defend does not violate due process); McKay v. McInnes, 141 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929) (summary attachment).

[16] Hawkland, *The Seed of Sniadach: Flower or Weed?*, 78 COM. L.J. 245, 245-49 (1973), discussing cases cited note 15 *supra*.

[17] 395 U.S. 337 (1969), *noted in* 35 Mo. L. REV. 405 (1970); *see* Comment, *Some Implications of Sniadach*, 70 COLUM. L. REV. 942 (1970).

[18] 395 U.S. at 338. The statute permitted a creditor, suing on a promissory note to freeze, by a clerk's order, one-half the wages due an employee. The debtor could free the garnished wages by posting bond. *Id.*

[19] *Id.* at 339, *citing, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-600 (1950) (seizure of misbranded drugs); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (seizure of assets after bank failure); Ownbey v. Morgan, 256 U.S. 94, 110-12 (1921) (foreign attachment); *see* Hawkland, *supra* note 16, at 247-48.

[20] 395 U.S. at 339.

[21] *Id.* at 340. The Court emphasized the special hardships caused by garnishment of wages. *Id.* at 340-42.

ment of which could cause immediate, adverse consequences to the wage earner. Thus, absent notice and prior hearing, the statutory procedure in question was constitutionally insufficient.[22] The standards set forth in *Sniadach* were found to be controlling in *Goldberg v. Kelly*.[23] Emphasizing that welfare payments provided each recipient "the very means by which to live,"[24] the Court held that the recipient's right to a pretermination hearing outweighed the government's interest in summary termination of such benefits.[25] Subsequent decisions of the Court found other forms of property interests deserving similar protection.[26] Nevertheless, noting the Court's characterization of wages and welfare benefits as "necessities of life" and pointing to decisions which distinguished the seizure of corporate assets and consumer assets,[27] a number of courts and writers interpreted *Sniadach* and *Goldberg* as being sui generis under the fourteenth amendment's due process clause.[28] This conclusion was soon dispelled by *Fuentes v. Shevin*.[29] In *Fuentes*, goods sold under conditional sales contracts had been repossessed pursuant to replevin statutes which failed to require notice and hearing prior to seizure.[30] Writing for four members of the Court, Justice Stewart found that although the purchasers lacked title to the seized property, they had

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[22] *Id.* at 342.

[23] 397 U.S. 254 (1970), *noted in* 23 U. FLA. L. REV. 422 (1971); *see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 100 (1970). In *Goldberg*, the Court first determined that welfare benefits were protected as property under the fourteenth amendment's due process clause. 397 U.S. at 261-62.

[24] 397 U.S. at 264.

[25] *Id.* at 266.

[26] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (father's custody of illegitimate children); Bell v. Burson, 402 U.S. 535 (1971) (driver's license).

[27] *Compare* D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972) (confession of judgment statute held constitutional in a commercial context where the contracting parties possess equal bargaining power), *with* Swarb v. Lenox, 405 U.S. 191 (1972) (consumer's waiver of notice and hearing must be voluntary and understood).

[28] *See, e.g.*, Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971) (three-judge court), *rev'd sub nom.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Fuentes v. Faircloth, 317 F. Supp. 954 (S.D. Fla. 1970) (three-judge court), *rev'd sub nom.*, Fuentes v. Shevin, 407 U.S. 67 (1972).

The question of due process standards for a creditor's ex parte remedies under conditional sales contracts remained unanswered. In the wake of *Sniadach*, courts declared both attachment and replevin statutes unconstitutional. *See* Fuentes v. Shevin, 407 U.S. 67, 72 & n.5 (1972); Hawkland, *supra* note 16, at 248; Newton & Timmons, *Fuentes "Repossessed,"* 26 BAYLOR L. REV. 469, 478-80 (1974).

[29] 407 U.S. 67 (1972) (4-3 decision), *noted in* 86 HARV. L. REV. 85 (1972); 40 U. CHI. L. REV. 206 (1972); *and* 82 YALE L.J. 1023 (1973).

[30] 407 U.S. at 73-78; *see* FLA. STAT. ANN. §§ 78.01, .08, .10, .13 (1964), *as amended*, (Supp. 1975-1976); PA. STAT. ANN. tit. 12, § 1821 (1967); PA. R. CIV. P. §§ 1037, 1073, 1076, 1077 (1968). These statutes provided for ex parte seizure of property upon the creditor's conclusory allegations to the court clerk and the creditor's posting of security for the property repossessed. Although the debtor could obtain the release of the property by posting bond, no prior notice or hearing was provided. The Florida statute provided for postseizure hearing; the Pennsylvania statute did not.

been deprived of a possessory interest protected by the fourteenth amendment.[31] Rather than constituting a departure from established principles, *Sniadach* and *Goldberg* were declared to be within the mainstream of previous decisions which demanded notice and opportunity for a hearing prior to any property seizure.[32] Only extraordinary situations justified postponement of these procedural safeguards.[33]

Several courts interpreted *Fuentes* to mandate notice and a hearing prior to even temporary deprivations of any significant property interest.[34] In 1974, however, the Supreme Court implicitly rejected this analysis in *Mitchell v. W.T. Grant Co.*[35] In *Mitchell*, the Supreme Court considered the relative interests of the debtors and creditors in the seized property and the interests of the state in providing ex parte relief to its creditors. In upholding Louisiana's sequestration statute,[36] the Court found that the provisions requiring judicial participation,

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[31] The theory that the bare use of property is a protected proprietary interest was developed by Justice Harlan in his concurrence in Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969). That this deprivation, although only temporary, is precluded under the due process clause of the fourteenth amendment is now generally accepted. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972); Newton & Timmons, *supra* note 28, at 484; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 71-83 (1974).

[32] The Court explained that due process requires prior notice and an opportunity to be heard at a time when the deprivation can still be prevented. Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972), *citing* Stanley v. Illinois, 405 U.S. 645, 677 (1972).

[33] 407 U.S. at 90-91, *citing* Boddie v. Connecticut, 401 U.S. 371, 379 (1971). The Court delineated those extraordinary circumstances which, in the past, had justified seizure without prior notice and hearing:

> Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 90-91. See cases cited note 15 *supra*.

[34] *E.g.*, Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973) (garnishment); Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972) (replevin); Marrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974) (garnishment); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973) (attachment); *see* Clark & Landers, *supra* note 14, at 363; West, *Fuentes Revisited*, 80 COM. L.J. 10 (1975); *The Supreme Court, 1973 Term, supra* note 31, at 72 n.11.

[35] 416 U.S. 600 (1974), *noted in* 54 NEB. L. REV. 206 (1975); 49 TUL. L. REV. 467 (1975); *and* 27 U. FLA. L. REV. 273 (1975). W.T. Grant Company brought an action for payments due on an account for appliances sold to Mitchell. Filing a sworn affidavit and posting bond, plaintiff asserted a vendor's lien and requested a writ of sequestration. A judge issued the writ, and the appliances were seized without notice or prior hearing. The *Mitchell* majority was composed of Chief Justice Burger, and Justices White, Blackmun, Rehnquist, and Powell. Chief Justice Burger and Justices White and Blackmun had dissented in *Fuentes*.

[36] 416 U.S. at 605-07; *see* LA. CODE CIV. P. ANN. arts. 3501, 3506, 3571 (West 1960).

opportunity for a prompt post-seizure hearing, factual proof of necessity, and the posting of bond by the plaintiff were sufficient to safeguard the debtor's property rights.[37] The Court also emphasized the debtor's ability to reclaim the seized goods by posting a bond.[38] In referring to the creditor's vested interest, the Court stressed the rapidly depreciable nature of most consumer goods which requires that creditors be afforded a prompt remedy in order to preserve their interests.[39] The state's interest in the controversy was characterized as being two-fold: First, to balance the debtor's interests against those of the creditor;[40] second, to avoid creditors relying upon harsh self-help measures.[41] *Sniadach* was easily distinguished on the basis of the peculiar nature of wages, the creditor's lack of a vested interest in such wages, and the statute's failure to provide the debtor adequate protection.[42] Although the creditor possessed a vested interest in *Fuentes*, the statutes in question there lacked the multiple safeguards found in *Mitchell*.[43] A number of commentators have viewed *Mitchell* as giving new life to prejudgment remedies.[44] Lower courts, however, have not been uniform in their interpretation of *Mitchell*.[45] The confusing status of the law of prejudg-

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[37] 416 U.S. at 608, 610. The statute provided that a court clerk could issue the writ. In the instant case, however, a judicial order was required because of Orleans Parish law. *Id.* at 606 n.5; *see* LA. CODE CIV. P. ANN. arts. 281-83 (West 1960). The Court relied on three prior decisions which had rejected due process attacks on prejudgment remedies: McKay v. McInnes, 279 U.S. 820 (1929); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); and Ownbey v. Morgan, 256 U.S. 94 (1921).

[38] 416 U.S. at 606-07.

[39] *Id.* at 607-09.

[40] *Id.* at 604-05.

[41] *Id.* at 605, 618. Self-help remedies are available to creditors in most states under section 9-503 of the UNIFORM COMMERCIAL CODE (1972 Official Text) which provides:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

Proceeding by "action" occurs when a writ of replevin is obtained because repossession cannot be accomplished without breach of the peace. Clark & Landers, *supra* note 14, at 372. Some commentators view the fact of legislative enactment of self-help statutes as sufficient state action to trigger due process requirements. *Id.* at 377; *see* Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) (landlord's lien).

[42] 416 U.S. at 614-15.

[43] *Id.* at 615-16.

[44] *See, e.g.*, Anderson & Guidry, *Mitchell v. W.T. Grant Co.: Recognition of Creditors Rights*, 80 COM. L.J. 63, 65 (1975); DelDuca, *Pre-Notice, Pre-Hearing, Pre-Judgment Seizure of Assets—Self-Help Repossession Under UCC § 9-503, Its Antecedents and Future*, 79 DICK. L. REV. 211, 234 (1975); Newton & Timmons, *supra* note 28, at 494.

[45] *See, e.g.*, Peacock v. Board of Regents, 510 F.2d 1324 (9th Cir. 1975) (*Mitchell* balancing applied to suspension from job prior to hearing); Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974) (invalidation statute similar to that in *Mitchell*, except no post-seizure hearing provided), *prob. juris. noted*, 95 S. Ct. 1556 (1975); Maxwell v. Hixson, 383 F. Supp. 320 (E.D. Tenn. 1974) (attachment for jurisdiction upheld, citing *Mitchell*); Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974) (upheld attachment issued by court clerk because issued only on specific grounds and there

ment remedies was accentuated by Justice Stewart's reading *Mitchell* as a veritable reversal of *Fuentes*.[46] In his view, the two cases were not significantly distinguishable.[47]

In the instant case, the Court stated that the Georgia court's narrow interpretation of *Sniadach*[48] was inappropriate, since *Sniadach* (wages) had been expanded beyond "necessities of life" by *Fuentes*. Distinguishing *Mitchell*, the Court noted that the Georgia statute had none of the saving characteristics of Louisiana's sequestration statute.[49] Reaffirming the principle that temporary property deprivations were protected under the due process clause, the Court found that sufficient probability of irreparable injury might result from the freezing of a corporate bank account. The corporate-consumer distinction was thus deemed not controlling, hence safeguards against the deprivation of defendant's property were necessary. The Court concluded that since the writ here was issued on conclusory allegations with neither judicial participation, opportunity for prompt hearing, nor opportunity to dissolve the writ without posting bond, the statute did not satisfy procedural due process.

Concurring in the result, Justice Powell viewed the majority opinion as one that "sweeps more broadly than . . . necessary."[50] Justice Powell read the decision as a revival of *Fuentes* which, in his view, had failed to strike a proper balance between creditors' and debtors' rights. Although he interpreted the majority as requiring only a prompt postseizure hearing, Justice Powell disagreed with any suggestion that pregarnishment judicial participation was categorically required.

Sniadach[51] established and *Fuentes*[52] expanded the concept that property rights must be protected during the interim between the seizure of property and

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existed a provision for prompt dissolution); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974) (justice of the peace not equivalent to a judge under *Mitchell* standards); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974) (sequestration statute invalid where no judicial order, factual showing, or prompt post-seizure hearing was required); Wood v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974) (repossession statute valid although no provision for prompt post-seizure hearing or bond to dissolve since judicial participation and a factual showing were required).

[46] Mitchell v. W.T. Grant Co., 416 U.S. 600, 629-36 (Stewart, J., dissenting). Justice Stewart stated that the only change since *Fuentes* was the membership of the Court. *Id.* at 635.

[47] *Id.* at 631-34; *see* Anderson & Guidry, *supra* note 44, at 64; 49 TUL. L. REV. 467, 472 (1975).

[48] North Ga. Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 201 S.E.2d 321 (1973), *rev'd*, 419 U.S. 601 (1975).

[49] The Louisiana statute provided the following safeguards for the debtor: (1) Prompt post-seizure hearing; (2) grounds for the writ to be clearly shown by specific facts, verified by affidavit; (3) adequate security to be posted by the seizing party; (4) defendant empowered to dissolve the writ by posting the required bond; and (5) although not provided by the general statute, local parish law required judicial participation. *See* LA. CODE CIV. P. ANN. arts. 3501, 3506, 3571 (West 1960).

[50] North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 609-14 (1975) (Powell, J., dissenting).

[51] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[52] Fuentes v. Shevin, 407 U.S. 67 (1972).

final adjudication.[53] Both decisions were based upon the assumption that due process was intended to protect the debtor, rather than to accommodate competing interests or promote judicial efficiency.[54] In contrast, *Mitchell*[55] established a balancing test, which weighed the debtor's property interests against the state's interest in providing a prompt remedy for the creditor.[56] In the instant decision, the Court found the two ostensibly conflicting approaches of *Sniadach-Fuentes* and *Mitchell* compatible, apparently making a factual, as opposed to a theoretical, analysis.[57] The *Sniadach-Fuentes* mandate was reaffirmed, yet the Court implied that prior notice and hearing would not be necessary when *Mitchell*-type safeguards were present. Thus, it appears that the Court will continue to demand protection of a debtor faced with temporary property deprivation, though cases must be decided individually with reference to the competing interests and the safeguards provided by the statute in question. Ascertaining the proper weight to be given the varied interests of the state, debtor, and creditor will pose the most difficult task for future courts. Only in wage garnishment cases does the result seem predictable.[58] Apparently, the Court now considers the degree of possible injury, rather than the debtor's status, to be determinative.[59] The nature of the creditor's interests also seems important. If the creditor is secured, as emphasized in *Mitchell*,[60] the state has a special interest in his protection. Unaddressed in the instant case is the question of whether the unsecured interest of a creditor would be sufficient to invoke *Mitchell* balancing. The relative weight of the debtor safeguards emphasized in *Mitchell* and *North Georgia* have never been delineated nor have enough cases been decided to make a valid comparative analysis. The most important safeguard, however, would seem to be whether a prompt, postseizure hearing is required.[61] The debtor should have a timely opportunity to challenge the writ's validity. Probably of equal weight, though never before the Court, are the standard provisions which require the creditor to post bond before seizure and grant the debtor a means of freeing his property.[62] Perhaps less significant are the often-mentioned provi-

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[53] *See id.* at 85-86; Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969).

[54] *See* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[55] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

[56] *Id.* at 608-10, 616-19.

[57] *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 614-20 (1975) (Blackmun, J., dissenting).

[58] Since *Sniadach* emphasized the special hardships accompanying wage garnishment, 395 U.S. at 340-41, and since the instant decision made specific reference to the "severity of the deprivation", 419 U.S. at 606, one may logically conclude that prior notice and hearing are absolutely required in wage garnishment cases. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[59] North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975).

[60] Mitchell v. W.T. Grant Co., 416 U.S. 600, 609, 618-19 (1974).

[61] North Ga. Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601, 613 (1975) (Powell, J., concurring) (emphasizing the primary importance of a post-seizure hearing).

[62] The Georgia statute in the instant case provided the typical bond provisions; i.e., the creditor is required to post security for twice the alleged indebtedness. The debtor is

sions for judicial participation and those requiring the assertion of factual, rather than conclusory, allegations before the issuing officer. There is some dispute whether these provisions offer any real protection for the debtor at all. For example, outside of an adversary hearing or close examination by the issuing officer, unchallenged factual allegations do not differ substantially from asserted conclusions.[63]

Mississippi's prejudgment remedies include attachment,[64] sequestration,[65] and replevin.[66] Attachment and sequestration can be issued by a court clerk, on affidavit and bond by the creditor, without prior notice to the debtor.[67] The defendant, however, may free the affected property by posting bond.[68] These two remedies, then, obviously lack the required debtor safeguards outlined in *Mitchell* and *North Georgia*, and, if challenged, the statutes should fall. In this context, examining the recent history of the Mississippi replevin statute is instructive. In 1972, the then existing replevin statute was invalidated because it failed to require notice and opportunity for a hearing.[69] A new replevin statute[70] has since been enacted which provides seemingly adequate debtor safeguards: judicial participation, a factual showing of necessity, and posting of bond by the creditor.[71] In addition, the statute demands that replevin actions be treated as "preference cases and shall be heard at the earliest possible date."[72] Of course, it remains to be seen whether actual practice will meet the due process requirements for a timely hearing. If so, the statute should clearly pass constitutional muster. Similar legislative action would ensure the validity of Mississippi's attachment and sequestration statutes.

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then allowed to free the garnished property by posting security conditioned on payment of any judgment rendered against him in the suit. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 601-04 (1975).

[63] In *Mitchell*, Justice Stewart questioned the protective value of either of these provisions. Mitchell v. W.T. Grant Co., 416 U.S. 600, 632 (1974) (Stewart, J., dissenting); *see The Supreme Court, 1973 Term, supra* note 31, at 79-80. *But see* Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); 49 TUL. L. REV. 467, 472 (1975).

[64] MISS. CODE ANN. §§ 11-33-1 to -107 (1972).

[65] *Id.* §§ 11-29-1 to -13.

[66] Act of Apr. 8, 1975, H.B. 1209, §§ 1-31, 1975 Reg. Sess., Miss. Legis. 9, 39-46.

[67] MISS. CODE ANN. §§ 11-29-1 to -5, 11-33-9 to -11, (1972); *see* Advance Lumber Co. v. Laurel Nat'l Bank, 86 Miss. 419, 38 So. 313 (1905); Meridian Fertilizer Factory v. Edwards, 77 Miss. 697, 27 So. 645 (1900).

[68] MISS. CODE ANN. § 11-33-45 (1972); *see* Glanagan v. King-Peeples Auto Co., 132 Miss. 95, 98-99, 94 So. 841, 842 (1923).

[69] Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972) (invalidating MISS. CODE ANN. §§ 11-37-1 to -57 (1972)).

[70] Act of Apr. 8, 1975, H.B. 1209, §§ 1-31, 1975 Reg. Sess., Miss. Legis. 9, 39-46.

[71] *Id.* §§ 1-3, 8.

[72] *Id.* § 23.

Constitutional Law—Separation of Powers—Speech or Debate Clause Prevents Judicial Review of Senate Subcommittee's Issuance of Subpoena Duces Tecum*

Pursuant to a United States Senate resolution authorizing the investigation of subversive activities,[1] the Senate Subcommittee on Internal Security issued a subpoena duces tecum to the Chemical Bank New York Trust Company. The subcommittee sought account records which would reveal the names of contributors to the United States Servicemen's Fund [USSF], an organization which operated coffeehouses near several domestic military installations and utilized these coffeehouses to inform off-duty United States servicemen of USSF's opposition to the Vietnam War.[2] USSF, alleging that revelation of its contributors' names would result in a fatal loss of funding and an abridgment of its members' first amendment rights of freedom of association,[3] filed suit against the subcommittee members and staff counsel in the United States District Court for the District of Columbia seeking injunctive relief to prevent the bank's compliance with, and the subcommittee's enforcement of, the subpoena.[4] The defendant subcommittee members contended that the speech or debate clause of the United States Constitution[5] immunized them from suit. Accepting their conten-

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* This recent decision was prepared from a paper written by Martin C. McWilliams, Jr., for course credit.

[1] The resolution authorized the subcommittee through its parent committee, the Committee on the Judiciary, to investigate: (1) the enforcement of the Internal Security Act of 1950; (2) the operation of other United States laws on espionage and sabatoge; and (3) the nature of subversive activities in the United States. S. Res. 341, 91st Cong., 2d Sess., 116 Cong. Rec. 3418 (1970); *see* Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1815 (1975). *See generally Hearings on Extent of Subversion in the "New Left" Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

[2] Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1816-17 (1975).

[3] An organization has standing to assert the constitutional rights of its individual members if requiring the members to assert their rights individually would discourage the exercise of those rights. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963); NAACP v. Alabama, 357 U.S. 449, 459 (1958); United States v. Board of School Comm'rs, 466 F.2d 573, 576-77 & n.1 (7th Cir. 1972) (collecting cases), *cert. denied sub nom.*, Citizens of Indianapolis for Quality Schools, Inc. v. United States, 410 U.S. 909 (1973).

[4] Specifically, USSF requested (1) a temporary restraining order to prevent the bank from complying with the subpoena duces tecum; (2) a preliminary injunction against the enforcement of the subpoena; (3) a permanent injunction against the enforcement of the subpoena; and (4) a declaratory judgment of the illegality of the subpoena and the Senate resolutions authorizing the subcommittee's actions. United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1255-57 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 1813 (1975).

The district court denied the motion for a temporary restraining order, entering an emergency stay order pending a full hearing by the district court. The District of Columbia Circuit reversed. Subsequently, the district court denied injunctive relief and dismissed the subcommittee members as defendants. 488 F.2d at 1256-58.

[5] U.S. Const. art. I, § 6, cl. 1 provides in pertinent part: "[F]or any Speech or Debate in either House, the [United States Senators and Representatives] shall not be questioned in any other Place."

tion, the district court dismissed the suit as to the subcommittee members.[6] The United States Court of Appeals for the District of Columbia Circuit reversed and ordered the district court to reinstate the subcommittee members as parties defendant.[7] On writ of certiorari the United States Supreme Court, *held*, reversed. The issuance of the subpoena duces tecum by Senate subcommittee members and chief counsel pursuant to a Senate resolution constitutes legislative action within the ambit of the speech or debate clause and is thus insulated from judicial review. *Eastland v. United States Servicemen's Fund*, 95 S. Ct. 1813 (1975).

The concept of legislative freedom of speech, embodied in the speech or debate clause, is a product of the struggle between England's Parliament and the Crown.[8] In its earliest stages, Parliament functioned as a judicial body. Deriving its authority from the Crown, Parliament was accorded immunity from interference by other branches of government.[9] During the 15th and 16th centuries, however, Parliament's judicial role expanded into a semilegislative one, sufficiently distinct from, and occasionally antagonistic to, the Crown as to require assertion of "freedom of speech or debate"[10] on the floor. During this period Parliament struggled with repressive Tudor and Stuart monarchs[11] for an expanded privilege "out of [a] need for unrestrained criticism of government measures."[12] Charles Stuart's repression of the members of Parliament was a "significant factor leading to the Civil War and the execution of the King."[13] The Restoration and Parliamentary supremacy having been achieved, Parliament assumed a variety of prerogatives—including an immunity for speech and debate, which was set forth in the 1689 Bill of Rights.[14] In America, colonial

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[6] United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1258 (D.C. Cir. 1973).

[7] *Id.* at 1270.

[8] For summaries of the historical development of the Constitution's speech or debate clause, see Tenney v. Brandhove, 341 U.S. 367, 369-75 (1951); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1, 3-16 (1968); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1120-44 (1973); Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132-35 (1910); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 961-66 (1951).

[9] Cella, *supra* note 8, at 4; Reinstein & Silverglate, *supra* note 8, at 1122-23; Yankwich, *supra* note 8, at 962.

[10] Cella, *supra* note 8, at 4-6; Reinstein & Silverglate, *supra* note 8, at 1123-24 & n.50; Veeder, *supra* note 8, at 132-34; Yankwich, *supra* note 8, at 963.

[11] Cella, *supra* note 8, at 4-12; Reinstein & Silverglate, *supra* note 8, at 1126-29; Veeder, *supra* note 8, at 132-33; Yankwich, *supra* note 8, at 963.

[12] Reinstein & Silverglate, *supra* note 8, at 1124, *quoting* Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 147, 163-64 (E. Fryde & E. Miller eds. 1970).

[13] Reinstein & Silverglate, *supra* note 8, at 1128.

[14] "[T]he freedome of speech, debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." T. PLUCKNETT, TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 451 (11th ed. 1960).

constitutions incorporated debate immunity[15] as did the Articles of Confederation.[16] By 1789, the principle was so firmly established that it received little discussion at the Constitutional Convention or during the subsequent ratifications.[17]

The speech or debate clause did not receive the United States Supreme Court's consideration until 1880, in *Kilbourn v. Thompson*.[18] In that suit, a civil action for unconstitutional imprisonment, members of Congress were dismissed as defendants, but the action was allowed to be maintained against the Sergeant at Arms of the House. *Kilbourn's* importance is seminal for it established that an exercise of the "powers. . . . of the legislature in the enactment of laws" is subject to judicial review.[19] Furthermore, *Kilbourn* buttressed the protections of the speech or debate clause by extending the legislative privilege beyond debates on the floor. Immunity of broad scope, encompassing the legislative function whether it is in the form of a written report, a vote, or a resolution is commensurate with vigorous representation of the people.[20] Finally, *Kilbourn* instituted the practice of dismissing suits against Congressmen when a congressional employee defendant is available.[21] Although its interpretation of legislative immunity was expansive, the Court in *Kilbourn* suggested that occasions "of an extraordinary character" might arise when members in "utter perversion of their powers to a criminal purpose,"[22] might not be afforded legislative immunity. The clause was not considered by the Court again until 1951, in *Tenney v. Brandhove*.[23] Although *Tenney* arose out of a series of actions by a committee of the California Senate, in writing for the Court, Justice Frankfurter discussed the proper sphere of both state and federal legislative immunity: Any inquiry by the judiciary into the propriety of legislative motive is improper.[24] Before the privilege of legislative immunity is defeated "it must be obvious that there [is] a usurpation of functions exclusively vested in the Judiciary or the Executive."[25] Together, *Kilbourn* and *Tenney* suggested that while the immunity accorded legislators was not absolute, its boundaries were not yet precisely established.[26]

In a series of six opinions rendered between 1966 and 1972, the Court attempted to define the scope of legislative immunity. One group of cases involved

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[15] *E.g.*, MD. DECLARATION OF RIGHTS art. XXI (1776); MASS. CONST. art. XXX (1780); N.H. CONST. art. XXX (1784); *see* Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951).

[16] ARTICLES OF CONFEDERATION V; Reinstein & Silverglate, *supra* note 8, at 1136 n.122.

[17] Cella, *supra* note 8, at 14-15; Reinstein & Silverglate, *supra* note 8, at 1136-37.

[18] 103 U.S. 168 (1880).

[19] *Id.* at 199.

[20] *Id.* at 204.

[21] *Id.* at 205.

[22] *Id.* at 204-05.

[23] 341 U.S. 367 (1951), *noted in* 3 SYRACUSE L. REV. 194 (1951); 30 TEXAS L. REV. 516 (1952); *and* 20 U. CIN. L. REV. 511 (1951).

[24] 341 U.S. at 377.

[25] *Id.* at 378.

[26] *See* Note, *Unenforced Congressional Subpoenas: Judicial Action and Congressional Immunity*, 59 IOWA L. REV. 581, 591-92 (1974).

criminal prosecutions against Congressmen for actions concerning legislation, thus posing the problem of potential executive interference with the legislative process. In *United States v. Johnson*,[27] Johnson's conviction for conspiring to make a speech on the floor for compensation was set aside when the Court found the prosecution dependent on unconstitutional inquiry into the former Congressman's motives.[28] *Gravel v. United States*[29] arose out of a federal grand jury investigation of Senator Gravel for his release to a publisher of the Pentagon Papers. When one of his aides and his publisher were subpoenaed, Gravel filed motions to quash, contending their testimony would violate his privilege under the speech or debate clause. The Court concluded that the aide should be afforded the same protection due the senator with respect to the placement of the documents into evidence in the subcommittee.[30] Commercial republication of the classified documents, however, was not within the protected legislative sphere, and testimony concerning publication of the papers was not privileged.[31] In *United States v. Brewster*,[32] Brewster was charged with "accepting a bribe in exchange for a promise relating to an official act."[33] Prosecution was not prohibited by the former senator's claim of immunity.[34] While the conviction in *Johnson* had been set aside because of reliance upon protected evidence regarding motives, a similar inquiry was not *necessary* here; Brewster's allegedly illegal conduct was the taking of, or the agreeing to take, the bribe.[35] "Taking a bribe is . . . no part of the legislative process or function; it is not a legislative act."[36] In summarizing its attitude toward the protection afforded by the speech or debate clause in executive prosecutions of legislators, the Court concluded:

> The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.[37]

Legislative investigations,[38] the subpoena power,[39] and activities in the legislative sphere conducted by aides rather than by Congressmen themselves,[40]

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[27] 383 U.S. 169 (1966).

[28] *Id.* at 184-85.

[29] 408 U.S. 606 (1972), *noted in* 22 DePaul L. Rev. 713 (1973); 11 Duquesne L. Rev. 677 (1973); 71 Mich. L. Rev. 1251 (1973); *and* 4 Seton Hall L. Rev. 277 (1972). The major importance of *Gravel* lies in its discussion of the extent of the immunity. *See* 408 U.S. at 616-22, 627-29; Reinstein & Silverglate, *supra* note 8, at 1114-18, 1148-57.

[30] 408 U.S. at 616.

[31] *Id.* at 625-26.

[32] 408 U.S. 501 (1972).

[33] *Id.* at 502.

[34] *Id.* at 528-29.

[35] *Id.* at 526.

[36] *Id.*

[37] *Id.* at 528.

[38] *See* McGrain v. Daugherty, 273 U.S. 125, 175 (1927).

[39] *See* Watkins v. United States, 354 U.S. 178, 188 (1957).

[40] *E.g.*, Gravel v. United States, 408 U.S. 606, 617 (1973).

among others,[41] have been found to be part of the legislative process. The proper sphere of legitimate legislative activity is a more difficult question in the second group of decisions. These cases—*Dombrowski v. Eastland*,[42] *Powell v. McCormack*,[43] and *Doe v. McMillan*,[44]—involved alleged legislative interference with the constitutional rights of private citizens. In each case the Court authorized judicial review of the congressional activities by dismissing the suit as to the congressional members and retaining congressional employees as defendants.[45] Dismissal of all the defendants "would be to invite gratuitous injury to citizens for little if any public purpose."[46] Thus, while the Court had not allowed an action to be maintained against a member of Congress, neither had it permitted an alleged abridgment of constitutional rights to go unredressed. Throughout the series of cases the Court declined to predict the result should a "pure" speech or debate case arise—a case in which constitutional rights were abridged, but only congressional defendants, shielded by the speech or debate clause, were available as defendants.[47] How the Court would approach this issue, particularly with regard to rights of association, was suggested in a series of legislative investigation cases contemporaneous to the speech or debate clause cases. In two cases, *Watkins v. United States*[48] and *Barenblatt v. United States*,[49] the appellants had refused to comply with subpoenas compelling them to testify before congressional committees. Upon appealing their resulting contempt citations, the witnesses contended that forcing them to answer the committee's questions would unconstitutionally infringe upon their first amendment rights. Although this course was hazardous,[50] it circumvented the defense

[41] The speech or debate clause covers not only words spoken in a debate but, "in short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Id. quoting* Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

[42] 387 U.S. 82 (1967) (per curiam), *noted in* 19 SYRACUSE L. REV. 115 (1967). For a discussion of this decision, see Note, Dombrowski v. Eastland—*A Political Compromise and its Impact*, 22 RUTGERS L. REV. 137 (1967).

[43] 395 U.S. 486 (1969), *noted in* 19 BUFFALO L. REV. 105 (1969); 19 DEPAUL L. REV. 171 (1969); 8 DUQUESNE L. REV. 190 (1969); 44 TUL. L. REV. 377 (1970); *and* 24 U. MIAMI L. REV. 389 (1970). *See generally Symposium—Comments on* Powell v. McCormack, 17 U.C.L.A.L. REV. 2, 2-191 (1969).

[44] 412 U.S. 306 (1973).

[45] Doe v. McMillan, 412 U.S. 306, 324 (1973); Powell v. McCormack, 395 U.S. 486, 506 (1969); Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967) (per curiam).

[46] Doe v. McMillan, 412 U.S. 306, 317 (1973).

[47] *E.g.*, Powell v. McCormack, 395 U.S. 486, 506 n.26 (1969); *accord*, Stamler v. Willis, 415 F.2d 1365, 1368 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970).

[48] 354 U.S. 178 (1957), *noted in* 36 N.C.L. REV. 320 (1958); 11 OKLA. L. REV. 308 (1958); *and* 106 U. PA. L. REV. 124 (1957).

[49] 360 U.S. 109 (1959), *noted in* 47 CALIF. L. REV. 930 (1959); 45 CORNELL L.Q. 354 (1960); *and* 28 FORDHAM L. REV. 522 (1959).

[50] A subpoenaed party may appeal to the committee for withdrawal or modification of the subpoena. If this is refused and the subpoenaed party continues to refuse compliance, the committee may ask the body of the House for a citation of contempt, which is forwarded to the United States Attorney for prosecution under the authority of 2 U.S.C. §§ 192-94 (1970). *See generally* Watkins v. United States, 354 U.S. 178 (1957).

of legislative immunity available if the contumacious witnesses had initially brought suit against members of Congress. In these cases, the Court adopted a balancing test to reconcile the competing interests involved:

> Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake . . . . "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures . . . ."[51]

The Court noted that a "compelling"[52] interest had been required when state legislatures attempted to curtail rights of association.[53] In three cases involving the NAACP,[54] the Court had emphasized that first amendment rights were "indispensable liberties;"[55] accordingly, a balancing procedure was to be followed when legislative action threatened such rights. The Court required: (1) Proof of a nexus sufficient to justify the inquiry undertaken and (2) establishing that some legislative purpose was at stake which outweighed the first amendment rights involved.[56] In these two lines of cases, the crucial question was whether the balancing approach would be used by the courts only when litigants who believed their constitutional rights were being violated were willing or able to submit to a legislative contempt citation. If not, the absolute immunity flowing from the speech or debate clause might be subsumed through implementing a balancing test which weighed the interests of the legislator against the "pure" first amendment interests of the private citizen when alternative means of redress are unavailable.

In the instant decision the Supreme Court identified the critical issue as whether or not the subcommittee members' actions fell within the "sphere of legislative activity."[57] The Court observed that if the issuance of the subpoena duces tecum was a part of legislative activity the absolute immunity of the speech or debate clause attached.[58] The Court then found that legislative investigations in general and the USSF investigation in particular were vital to an effective law making body and thus could properly be characterized as within the legislative sphere.[59] Therefore, the Court concluded that the speech or debate clause immunized the subcommittee members from suit in this case. The Court then determined that this speech or debate clause immunity also shielded

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[51] 360 U.S. at 126-27, *quoting* Watkins v. United States, 354 U.S. 178, 198 (1957).

[52] 360 U.S. at 127, *quoting* NAACP v. Alabama, 357 U.S. 449, 463, 466 (1958).

[53] NAACP v. Alabama, 357 U.S. 449 (1958) (dismissal of contempt citation issued against the NAACP for refusing to comply with subpoena ordering the production of the association's membership lists).

[54] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

[55] NAACP v. Alabama, 357 U.S. 449, 461 (1958).

[56] *See, e.g.*, Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963).

[57] Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813 (1975).

[58] *Id.* at 1823.

[59] *Id.* at 1822-23.

the subcommittee's chief counsel from suit.[60] Finally, in refusing to balance the first amendment rights and the speech or debate clause, the Court stressed the "absolute nature" of the speech or debate immunity and confined the application of a balancing test to those criminal cases in which the defendant resisted congressional investigation by asserting first amendment rights.[61]

Justice Marshall, in his concurrence joined by Justices Brennan and Stewart, agreed with the majority that if "the Senators' actions were within the 'legitimate legislative sphere,' the matter ends there and they are no longer answerable to the court."[62] Because the protection is personal to the Congressmen, the concurrence emphasized, the majority's holding did not immunize Congress from judicial review of illegal subpoenas.[63] For example, subpoenaed parties on occasion had refused compliance and appealed the resulting contempt citation. On such an appeal the parties' rights would be "respected along with the legitimate needs of the legislature"[64]—that is, balanced against legislative purpose.

In a brief dissent, Justice Douglas argued that the rights granted by the Constitution and the Bill of Rights could not be taken away by invoking legislative immunity.[65] He maintained that "no regime of law that can rightfully claim that name may make trustees of . . . vast powers immune from actions brought by people who have been wronged by official action."[66]

After *USSF*, private citizens who seek to attack congressional activities as violative of their constitutional rights are faced with the conundrum of how those rights are to be vindicated in the courts. This problem may be addressed by raising two questions: Was the Court correct in deciding that, in a "pure" speech or debate clause case, individuals are to be denied redress of constitutionally guaranteed rights? Assuming that the Court will adhere to this holding in future "pure" first amendment cases, what alternative procedure for redress is available? Prior decisions uniformly dismissed actions against Congressmen insofar as legislative activities were concerned.[67] If these cases are investigated no further, dismissal in the present case appears proper.[68] This

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[60] *Id.* at 1823.

[61] *Id.* at 1824-25 & n.16.

[62] *Id.* at 1827 (Marshall, J., concurring).

[63] Justice Marshall declared:

> The Speech and Debate Clause cannot be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases . . . indicate only that a Member of Congress or his aide may not be called upon to defend a subpoena against constitutional objection, and not that the objection will not be heard at all.

Id. at 1828; *see* Doe v. McMillan, 412 U.S. 306, 326 (1973) (Douglas, J., concurring); Powell v. McCormack, 395 U.S. 486, 503 (1969); Watkins v. United States, 354 U.S. 178, 188 (1957).

[64] 95 S. Ct. at 1828.

[65] *Id.* at 1829 (Douglas, J., dissenting).

[66] *Id.*

[67] See text accompanying notes 21, 45 & 46 *supra*.

[68] This "literal" view—treating all cases as being governed by the literal wording of the clause—has been strongly criticized as inconsistent with the historic purpose of the

reading, however, ignores the Court's frequent statements of the preferred position to be accorded first amendment rights, and the care government should take when regulating those rights,[69] and the Court's prior language that speech or debate cases are to be decided in a case-by-case fashion.[70] It also fails to recognize that in each of the earlier cases involving infringement of an individual's constitutional rights some type of redress was allowed[71] and that in the recent cases relied on by the majority, Congressmen were being insulated from personal suit brought by the Executive.[72] In view of these factors the dismissal seems improper. Remand for evaluation of the methods available to protect the litigant's threatened constitutional rights would be appropriate.[73] In no similar

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clause and as leading to "undesirable consequences for our system of government." Reinstein & Silverglate, *supra* note 8, at 1121; *see id.* at 1144, 1146, 1148, 1170.

[69] These [first amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 433 (1963); *see* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 544, 557-58 (1963); Breard v. City of Alexandria, 341 U.S. 622, 650 (1951) (Black, J., dissenting); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[70] *See* Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951).

[71] Usually this was accomplished by suing unprivileged parties. *See, e.g.*, Doe v. McMillan, 412 U.S. 306 (1973) (Public Printer); Powell v. McCormack, 395 U.S. 486 (1969) (Doorkeeper, Clerk, and Sergeant at Arms of the House); Kilbourn v. Thompson, 103 U.S. 168 (1880) (Sergeant at Arms); Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970) (Attorney General and United States Attorney).

It has been suggested that "separation of powers forbids the granting of injunctive relief by the District Court" against legislative defendants. Doe v. McMillan, 412 U.S. 306, 343 (1973) (Rehnquist, J., dissenting). *But see* Stamler v. Willis, 415 F.2d 1365, 1369-70 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970):

The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government. . . .

If these plaintiffs should ultimately prevail . . . members of Congress will not be imperiled in their Congressional functions but merely have to conduct their future investigations under a narrower, constitutional mandate.

415 F.2d at 1369-70, *citing* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Powell v. McCormack, 395 U.S. 486, 506 (1969); United States v. Robel, 389 U.S. 258 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); 78 HARV. L. REV. 1473, 1475 (1965).

[72] *See* Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813 (1975), *citing* Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); United States v. Johnson, 383 U.S. 169 (1966); Barr v. Matteo, 360 U.S. 564 (1959) (dicta). *Powell, Dombrowski,* and *McMillan* were civil suits seeking redress of personal rights, but alternative relief was available in each case.

[73] This approach was used in Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970). The court of appeals in *USSF* had ordered the district court on remand to determine whether nonmember defendants were available. United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1270 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 1813 (1975).

case have first amendment rights been sacrificed purely to privilege.[74] Because of the personal nature of the speech or debate immunity, loss of first amendment rights without at least a balancing of interests along the lines of *Barenblatt* seems inappropriate. Rather than allow a remand to balance these opposing interests, the Supreme Court traded away the individuals' rights for a measure of legislative expediency. The improvidence of the exchange is evident: First, mere expediency would seem to pale in importance when compared with the "preferred position" of first amendment rights;[75] second, if expediency is to become the fulcrum of the privilege then, carried to its logical conclusion, even suits challenging the constitutionality of a law, the traditional method of vindicating rights abridged by legislative acts, will be foreclosed since it would similarly impede the legislative process. Finally, the broad language of both the speech or debate clause and the first amendment would seem to warrant careful analysis and consideration rather than a cursory finding that one provision overwhelms the other.[76]

Assuming that the majority's language regarding delay of legislative action was not meant to foreclose completely a vindication of individual rights,[77] a variety of actions remain available. Joining as defendant a congressional employee whose function is vital to execution of the contested action will remain the most useful method.[78] In *USSF*, however, this procedure was circumvented by the subcommittee counsel's refusal to disclose names of alternate defendants. Similar nondisclosure may frustrate future efforts to join congressional employee-defendants. When the aggrieved party is itself the object of the subpoena, it may take the risky course of refusing to comply and appealing the subpoena to the committee.[79] If the committee does not alter its demand, the aggrieved party may continue to refuse compliance and litigate any resulting contempt citation[80] in the courts. A considerable range of defenses is available

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[74] In Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); Tenney v. Brandhove, 341 U.S. 367 (1951); and Kilbourn v. Thompson, 103 U.S. 168 (1880), members were dismissed as defendants from civil suits seeking redress of individual rights, but in each case some alternative defendant was available.

[75] *See* cases cited at note 69 *supra*.

[76] *See* Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1829 (1975), where Justice Douglas wrote:

> It is my view that no official, no matter how high or majestic his or her office, who is within the reach of the judicial process, may invoke immunity for his actions for which wrongdoers normally suffer.

See also Doe v. McMillan, 412 U.S. 306, 328 (1973) (Douglas, J., concurring).

[77] Some measure of litigation is inevitable. *Cf.* Powell v. McCormack, 395 U.S. 486, 505 n.25 (1969). The *USSF* majority urges rapid disposition of such necessary steps. Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1825 n.17 (1975).

[78] *Cf.* Gravel v. United States, 408 U.S. 606, 618 (1972); Powell v. McCormack, 395 U.S. 486, 506 (1969); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (per curiam); Hentoff v. Ichord, 318 F. Supp. 1175, 1180-81 (D.D.C. 1970).

[79] *See* Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971) (per curiam).

[80] Although the committee itself may not cite for contempt, it may obtain a citation from the full Senate. The citation is then forwarded to the United States Attorney for prosecution pursuant to 2 U.S.C. §§ 192-94 (1970). *See* Watkins v. United States, 354 U.S. 178 (1957).

should this occur: The committee's authorizing legislation may be attacked as overbroad;[81] its legislative purpose may be challenged;[82] the sufficiency of notice of the pertinency of the queries to the stated legislative purpose may be contested;[83] and, most significantly, the petitioner's threatened rights should be weighed by the court against the committee's legislative purpose.[84] Appealing a contempt citation, however, is not available in cases like *USSF* where the subpoena is addressed to a third party who cannot be expected to risk criminal conviction.[85] When the addressee is a third party, an injunction against that party's compliance may be sought. Such an action, however, may be foreclosed by problems of standing[86] or of acquiring jurisdiction over the third party.[87] In "pure" situations there are some indications that purely declaratory actions against the committee might be entertained.[88] In *USSF*, the majority at least partly based its reversal on the possibility of a coercive order being entered against Congressmen. An action could be brought against the Attorney General and the United States Attorney seeking a declaratory judgment that the subpoena was illegal, thus binding the named defendants. This approach was approved by the Seventh Circuit in *Stamler v. Willis*;[89] however, no similar case has yet reached the Supreme Court. Use of a declaratory action would appear

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[81] *See* Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970).

[82] Congressional investigations are presumed to be pursuant to valid legislative purposes, and the scope of the investigative power is limited only by enabling legislation. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 133 (1959); Watkins v. United States, 354 U.S. 178, 200 (1957); *cf.* McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

[83] *See* Watkins v. United States, 354 U.S. 178, 208-16 (1957); Note, *The Application of the Fourth Amendment to Congressional Investigations*, 52 MINN. L. REV. 665, 675-77 (1968).

[84] *See* Eastland v. United States Servicemen's Fund, 95 S. Ct. 1813, 1827 (1975) (Marshall, J., concurring).

[85] 42 U. CIN. L. REV. 780, 784 (1973).

[86] Depositors have been denied standing to intervene on fourth and fifth amendment grounds when subpoenas were addressed to banks. 52 TEXAS L. REV. 385, 387 n.10 (1974). Standing based on a chilling effect on first amendment rights, *see* NAACP v. Alabama, 357 U.S. 449, 458-59 (1958), however, should be more easily established than that based on self-incrimination or an expectation of privacy. *See* Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968).

[87] United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1269 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 1813 (1975).

[88] Powell v. McCormack, 395 U.S. 486, 516-18 (1969), was a declaratory action controlling internal congressional affairs. The member defendants were dismissed because relief could be effected through nonmember employees.

In cases in which pre-enforcement relief has been sought against congressional subpoenas, the courts have refused, at least partly on grounds of comity, to grant such relief where other relief was available. *See, e.g.*, Sanders v. McClellan, 463 F.2d 894, 898-99 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751, 753 (D.C. Cir. 1971) (per curiam). That the courts took cognizance of the controversies at all indicates that in other circumstances relief may be available. *Cf. id.* at 753; Note, *supra* note 26, at 586, 587.

[89] 415 F.2d 1365, 1368 (7th Cir. 1969), *cert. denied sub nom.*, Ichord v. Stamler, 399 U.S. 929 (1970), *noted in* 1970 WIS. L. REV. 1216.

consonant with the prophylactic function of the speech or debate clause, since a coercive order against a member would not result,[90] and interference with the legislative process would be minimal. The action may be maintained by a party whose rights are threatened and has no other means of relief, even when that party is not the addressee of the subpoena.[91] Finally, a declaratory action would execute the Court's previously announced policy of providing some means of redress when constitutional rights are abridged by governmental action.

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[90] *Cf.* Doe v. McMillan, 412 U.S. 306, 330 (1973) (Douglas, Marshall & Brennan, JJ., concurring). *Compare* Bond v. Floyd, 385 U.S. 116 (1966) (equitable relief allowed against state legislative defendant), *with* Tenney v. Brandhove, 341 U.S. 367 (1951) (coercive relief not allowed against state legislative defendant by analogy to federal speech or debate immunity).

[91] *Cf.* United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973), *rev'd*, 95 S. Ct. 1813 (1975).

BOOK REVIEWS

ESTATE PLANNING—QUICK REFERENCE OUTLINE (22d ed.)
by William R. Spinney.
Chicago: Commerce Clearing House. 1975. Pp. 152. $3.00.

*Herman E. Taylor**

As a "quick reference outline" this booklet should be very helpful to all who are interested in the subject of estate planning, whether they be lawyers, law students, teachers, accountants, trust officers, investment or insurance counselors, or property owners. The publication does an excellent job of explaining the federal estate, gift, and income taxes, and their interrelationships. It brings to mind the diverse property interests and problems that must be considered by the estate planner. It is current to the extent that any annual publication can be in the continually changing field of tax law. Filled with citations of code sections, regulations, rulings, cases, and IRS policy statements, it is a good starting point for research. This reference work can be as useful to the lawyer who specializes in estate planning as it is to the lawyer who occasionally drafts a will or sets up a trust. At the price of $3, it is within the reach of every practicing lawyer.

The subject of estate planning encompasses problems of the accumulation, use, conservation, and disposition of wealth, great and small, of protection of desired beneficiaries, and of the prevention of unnecessary erosion by taxes, expenses, and inflation. A "quick reference outline" could scarcely give notice of all the problems in the field or attain perfect balance between essential items. Some increased emphasis upon "non-tax" problems in estate planning would improve coverage of the subject. Very little is presented on the "accumulation" phases of estate planning, of advisable investment programs, of the choice of types of life insurance, of stretching meager means in small estates, of family procedures trusts, of plans for survivorship property at the survivor's death, or of planning for gaps in social security payments.

Imaginative and innovative planners will find a succession of helpful guides for community property laws, analyzing the estate, estimating taxes and costs (of present and proposed plans in alternative events of earlier death of husband or wife), and planning to conserve assets. Also covered are such topics as liquidation of business interests, professional corporations, valuation of limited interests, wrongful death proceeds, contemplation of death evidence, life insurance trusts, and taxation of life insurance proceeds. Tables in the appendix assist in valuation of life estates, remainders, reversions, and present values. Federal estate, gift, and income tax rate tables are also included.

In conclusion, the strengths of this "quick reference outline" in federal tax law and in techniques for use in estate planning far outweigh any of its weaknesses. While this publication would be a valuable addition to any library, it would be extremely worthwhile to the practicing lawyer and nearly indispensable to those who specialize in estate planning.

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*Attorney-at-Law, Memphis, Tennessee; Professor of Business Law, Memphis State University.

PRIMER OF LABOR RELATIONS (20th ed.).
Edited by HOWARD J. ANDERSON.
Washington, D.C.: Bureau of National Affairs, Inc.
1975. Pp. 144. $5.00.

*Earl W. DeHart**

Primer of Labor Relations is an aptly named book for the practicing attorney who occasionally encounters a labor relations matter. The book first outlines those federal and state laws which form the legal bases of "labor law" matters, including the National Labor Relations Act. Proceeding from skillfully condensed outlines of the pertinent acts, the author treats jurisdictional coverage both as to the commerce question and legal entities affected. The topics which follow may properly be characterized as the "bread and meat" of labor relations. Thus the author succeeds in reducing the repetitive legal problems of the more common labor law proceedings to their distilled essence. Matters surrounding the rights of employees to organize, the issues raised by the process of choosing a bargaining agent, what is required in bargaining and demanded of negotiators, and the maze of problems raised by strikes, picketing, boycotts, and lockouts are reduced to rather well defined, basic "rules."

Having treated the substance of common labor law problems, the author provides a basic "How To" chapter devoted to using the National Labor Relations Board's services. Rounding out the field now generally defined as "labor law," the booklet treats the settlement of labor disputes by arbitration and provides a very useful thumbnail sketch of Title VII of the Civil Rights Act of 1964. What is potentially the most valuable portion of the booklet is the "Glossary of Labor Terms" appearing at the end of the work. This effort should not be overlooked. Rather, it should be read in full inasmuch as the author not only succeeds in defining each term quite clearly, but also establishes its basic usage in many instances.

A word of caution is offered: The booklet is a useful tool for the purpose intended and outlined above; it is seldom the ultimate answer to a legal problem, no matter how dogmatically written. Changes in factual circumstances and the personnel and attitudes of the National Labor Relations Board limit the utility of calcified conclusions. The principal value of *Primer of Labor Relations* is its capacity to alert the inexperienced attorney to the various pitfalls dug by the courts and administrative agencies over the years. Having been put on notice that a matter is cognizable under the law, important and perhaps critical to the outcome of the entire proceeding, the attorney is in a position to devote an exhaustive effort to its handling or to associate a specialist in the field.

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* Partner, Weintraub & DeHart, Memphis, Tennessee; and Adjunct Professor of Law, University of Mississippi.

KNOWLEDGE AND POLITICS by Roberto Mangabeira Unger. New York: The Free Press. 1975. Pp. 336. $12.95.

*Toby M. Wallace**

Knowledge and Politics begins with a disclaimer which is not uncommon among political science writers, a caveat that the author does not assert solutions to the problems of the world but merely establishes a framework within which those problems may be addressed. Modesty in intellectual affairs is to be applauded, but all too often such disclaimers serve as rationalization for a lack of substance: if an author has nothing new to say he simply says something old in a different way.

Unger has some new things to say, though the manner in which he says them often fails to avoid the turgidity which generally characterizes philosophical political discourse. If his initial premises are granted, his essay provides a coherent set of concepts with which to analyze the object of the author's interest. That object is the set of ideas known as liberalism.

Liberalism in this context means something quite different from the journalistic use of the terms "liberal" and "conservative" to distinguish between such disparate figures as, for example, Edward Kennedy or George McGovern on the one hand and Barry Goldwater or William F. Buckley on the other. It refers to what political scientists call classical liberalism—that body of thought commonly associated with Western democratic theory. It includes almost all American political thought, the views of the Kennedys and Buckleys alike, and excludes on the right such classically conservative notions as monarchy and fascism and on the left the radical doctrines of socialism and communism.

To Unger liberalism has been the dominant force in the realm of ideas since the mid-17th century. Liberalism contains within itself, however, essential contradictions which stem from the incompatibility of reason and desire. These contradictions result in liberal distinctions between facts and values, means and ends, and immanence and transcendence. Jurisprudence is split between the positivist and natural rights schools of thought as to the source of law.

In a denial of the dialectic, Unger maintains that in order to move beyond liberalism it is necessary to engage in "total criticism," that since liberalism is a coherent whole it is useless to tinker with various reforms of isolated parts of the doctrine. It is necessary to alter the basic values of liberal psychology upon which liberal political theory and the liberal state are based. Unger dwells in such rarefied heights of abstraction that Marxism becomes only "partial criticism" of liberalism. Such a point of view does not make Unger more radical than Marx. Unger's model is so abstract that it is largely irrelevant to considerations of ideology and almost totally confined to "pure" political theory.

Unger, like Marx, is better at analyzing liberalism than he is at describing the world beyond. The abstruse nature of his analysis, which was tolerable while he was discussing a familiar body of ideas, becomes frustrating as he moves to describe alternatives to liberal society. Yet Unger never promised to solve concrete political problems. Within the limits of his initial warning he has provided an intellectually stimulating discourse on modern political thought.

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*Assistant Professor of Political Science, University of Mississippi. B.A. 1967, J.D. 1975, University of Mississippi; M.A. 1969, Yale University.

We Are Your Sons
By Robert and Michael Meeropol.
Boston: Houghton Mifflin Company. 1975.
Pp. 396. $10.00.

*Robert Oswald**

Tension permeated the United States. Stalin ruled Russia. The Iron Curtain had descended across Europe. The presumed monolithic monster of Communism was threatening the free nations of the world. The strains of World War II and its immediate aftermath had produced a certain anti-Russia Pavlov conditioning in the West. We were only 5 years removed from the unconscionable "detention" of hundreds of thousands of Japanese in California, brought on by the early panic conditions of World War II. It was this emotional and political furor that caused President Truman to caution the nation not to be alarmed at every demagogic cry of "Red or Pinko." Truman labelled such screams "red herrings." On July 17, 1950, Julius Rosenberg was arrested by the FBI and charged with spying for the Soviet Union in connection with atomic bomb secrets. On August 11, 1950, his wife, Ethel Rosenberg, was arrested on the same charges.

The authors, sons of Ethel and Julius Rosenberg, use letters received from their incarcerated parents as the principal source material for the book. Although this method of presentation takes the reader into the thoughts and anxieties of the Rosenbergs as they languished in prison, the dramatic effect is diminished by the fact that the perpetuation of the letters was preconceived and that they were written in duplicate, obviously for ultimate public use.

The authors give little evidence to support their contention of the innocence of their parents who were convicted by a jury after an extended trial. Instead, they refer the reader to other works which, they contend, establish their parents' innocence. The emotional impact on the two young sons was severe, and their confusion, anxieties, and frustrations are ably set forth. That they survived the trauma as well as they did is amazing.

The book raises two points: (1) The Rosenbergs were innocent, and (2) the death penalty was unjustified, unreasonable, and inappropriate in the light of sentences given in other contemporary "spy" trials. The guilt or innocence of the Rosenbergs to the specific charges is highly debatable. Their case is presented as one where the fact they were avowed Communist sympathizers was exploited to the fullest by the prosecution as a warning to other would-be sympathizers and the general public. The death sentence criticism appears justified since it was so inconsistent with other sentences, a fact which the authors adequately document.

The book is somewhat tedious to read and boring in parts because of the repetitious content of the letters which comprise a large part of the subject matter. Current disclosures of past governmental misconduct and illegal activities, however, increase one's interest in the book.

---

*Attorney, Pascagoula, Mississippi.

Any reader familiar with the post war years will be drawn to reflect about the vast changes which have occurred since the Rosenbergs were caught in the web of a vindictive bureaucracy. One wonders what attitudes the Rosenbergs would have today had they lived. Many of the criticisms arising from the trial, appeals, and execution of the Rosenbergs have been largely obviated either by decisions of the Supreme Court or by the Congress or are now in the process of change.

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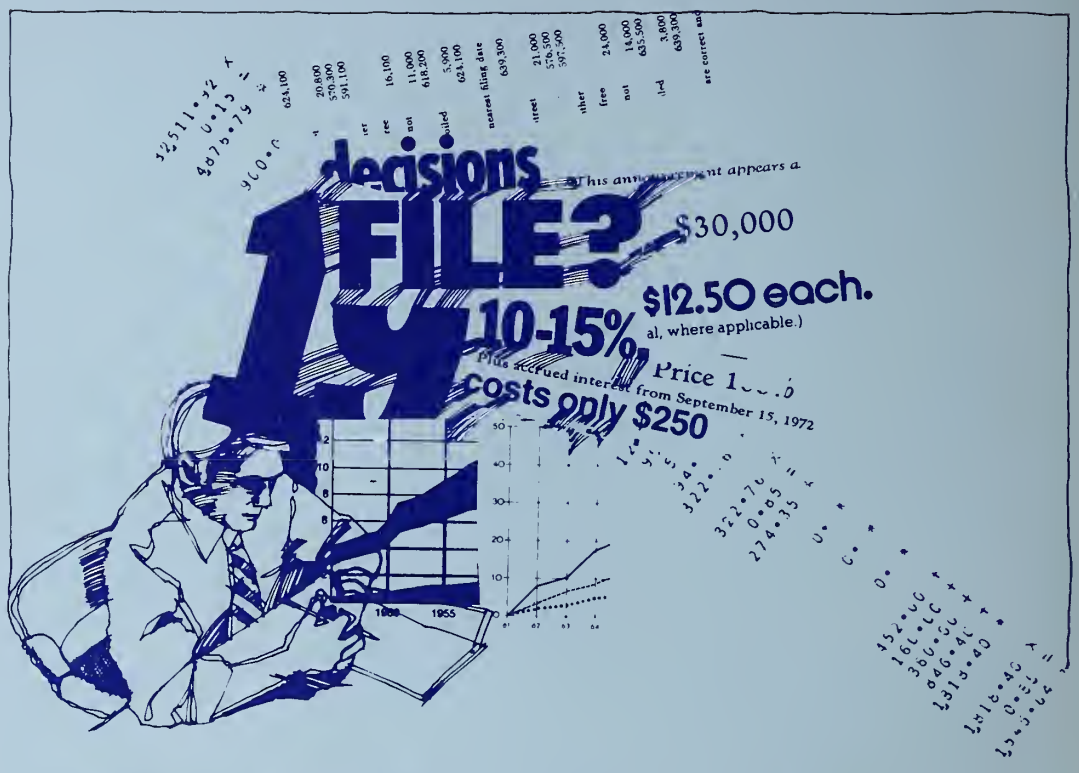

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